



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



HARVARD LAW LIBRARY





.

.

.

.

.

.

.

i

Mar 18

THE OHIO NISI PRIUS REPORTS

NEW SERIES. VOLUME XVI.

BEING REPORTS OF CASES DECIDED

BY THE

SUPERIOR, COMMON PLEAS, PROBATE AND
INSOLVENCY COURTS OF THE
STATE OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1915.

COPYRIGHT, 1915,
BY THE OHIO LAW REPORTER COMPANY.

MAY 3 1915

TABLE OF CASES.

Agler, Frey v.	379	Cleveland v. Coughlin	468
Albrecht v. Hoffman	285	Cole, Mansfield v.	209
American Bonding Co., State		Columbus v. Biederman	140
ex rel Hunt v.	497	Columbus, Stern v.	353
Andrews v. State	59	Columbus Citizens Telephone	
		Co., Schwartz v.	129
B. & O. Railroad, Thomas v.	194	Commercial Real Estate Co.,	
Balbo, Estate of	9	Cross v.	97
Biederman, Columbus v.	140	Cogant v. Conant	72
Bisch v. Ralston Steel Car Co.	33	Continental Sugar Co., Don-	
Board of Education v. Hop-		nell v.	331
kins	279	Coughlin, Cleveland v.	468
Boone, Withrow v.	506	Cox, State v.	513
Bowlus-Hackett Fruit Co.,		Cross v. Commercial Real Es-	
Gus. M. Salzer & Bros. v.	358	tate Co.	97
Brighton German Bank, Herr-		Crow Motor Car Co., Taylor v.	557
mann v.	47	Crown Overall Mfg. Co. v.	
Brown v. Industrial Commis-		Levy Overall Mfg. Co.	561
sion	160		
Brunet v. Holden Paper Co.	465	Diamond Light Co., Cincin-	
Bumiller, Remelin v.	22	nati v.	305
Butler v. Karb	593 and 607	Donnell v. Continental Sugar	
		Co.	331
		Durrell v. Reynolds	486
		Dye, Zepf & Co. v.	443
C., H. & D. Ry., Richter Grain			
Co. v.	81	Ellis, Monfort v.	225
C., L. & N. Ry. v. Cincinnati	587	Eppinger v. Cincinnati	257
Chamberlin v. Lunkenheimer		Erie Railroad, Huszty v.	254
Co.	614		
Chapman Co., Windisch v.	62	Factory Power Co., State v.	545
Christian Moerlein Brewing		Fischer Auto & Service Co. v.	
Co., Geiger v.	455	Cincinnati	369
Cincinnati, C., L. & N. Ry. v.	587	First National Bank v. Hunt	65
Cincinnati v. Diamond Light		Fox v. Fox	394
Co.	305	Fry v. Agler	379
Cincinnati, Eppinger v.	257		
Cincinnati, Fischer Auto &		Gaisser v. Hansen	577
Service Co. v.	369	Geiger v. Christian Moerlein	
Cincinnati v. Hopkins	279	Brewing Co.	445
Cincinnati v. Ziegler	169	Gibson-Spence Coal Co., Citi-	
Cincinnati Traction Co., Mad-		zens S. & T. Co. v.	273
gett v.	93		
Citizens S. & T. Co. v. Gib-			
son-Spence Coal Co.	273		

TABLE OF CASES.

Gus. M. Salzer & Bros. v. Bowlus-Hackett Fruit Co.	358	Macintosh, Schneider v.	298
H. & S. Pogue Co. v. Townsley	590	Madgett v. Cincinnati Trac-	93
Hansen, Gaisser v.	577	tion Co.	209
Herrmann v. Brighton Ger-	47	Mansfield v. Cole	445
man Bank	410	Moerlein Brewing Co., Gei-	225
Hillman, Stall v.	417	ger v.	225
Hockett v. State Liquor Li-	285	Monfort v. Ellis	177
cense Board	465	Montpellier Telephone Co. v.	
Hoffman, Albrecht v.	279	Montpellier Mutual Tele-	
Holden Paper Co., Brunet v.	279	phone Co.	
Hopkins, Board of Educa-	449		
tion v.	493	National Surety Co., State	
Hopkins, Cincinnati v.	65	ex rel Hunt v.	497
Horner, State ex rel Locher v.	254	Nicholas Building Co., Smith	504
Hughes v. Kline		v.	
Hunt, First National Bank v.		Nypano Railroad, Urbana Egg	
Husztly v. Erie Railroad		Case Co. v.	321
Industrial Commission, Brown	160	Pogue Co. v. Townsley	590
v.	9	Prestien, State ex rel v. 289, 497	
In re Estate of Balbo	337		
In re Estate of Kohanyi	401	Railway v. Cincinnati	587
In re Henry H. Stuebe	89	Railway, Husztly v.	254
In re Petition to Prohibit	121	Railway, Richter Grain Co. v.	81
Sale of Intoxicating Liquor	481	Railway, Thomas v.	194
In re Spoliated Will of		Railway, Urbana Egg Case	
Thompson		Co. v.	321
Irvine v. McCoy		Ralston Steel Car Co., Bisch	
		v.	33
John Chapman Co., Win-	62	Rapp, State ex rel v.	1
disch v.		Remelin v. Bumiller	22
		Renz v. Schmid	223
Karb, Butler v. 593 and 607		Reynard v. Utica & Homer	
Keefer, State ex rel Fitz-	145	Telephone Co.	191
gerald v.	41	Reynolds, Durrell v.	486
Keifer, State for use of, v. ..	493	Richter Grain Co. v. C., H. &	
Kline, Hughes v.	445	D. Ry.	81
Kluber v. Smith & Mills Co.	262		
Knecht v. Knecht	337	Salzer & Bros. v. Bowlus-Hack-	
Kohanyi, Estate of		ett Fruit Co.	358
		Schmid, Renz v.	223
Levy Overall Mfg. Co., Crown	561	Schneider & Son v. Macintosh	298
Overall Mfg. Co. v.	614	Schroeder v. Schroeder	245
Lunkenheimer Co., Chamber-	167	Schroeder, State v.	265
lin v.		Schwartz v. Columbus Citi-	
Lynch v. State		zens Telephone Co.	129
		Smith & Mills Co., Kluber v.	445
McCoy, Irvine v.	481	Smith v. Nicholas Building	
		Co.	504
		Smith, State v. 385 and	535
		Stall v. Hillman	410
		State, Andrews v.	59

TABLE OF CASES.

v

State v. Cox	513	Telephone Co., Reynard v. . .	191
State v. Factory Power Co. . .	545	Telephone Co., Schwartz v. . .	129
State ex rel Hunt v. American Bonding Co. and National Surety Co.	497	Telephone Co. v. Telephone Co.	177
State, Lynch v.	167	Thomas v. B. & O. Railroad ..	194
State v. Schroeder	265	Thompson, In re Spoliated Will of	121
State v. Smith385 and	535	Townsley, H. & S. Pogue Co. v.	590
State, Straka v.	554	Traction Co., Madgett v.	93
State ex rel Cincinnati Bill Posting Co. v. Rapp	1		
State ex rel Fitzgerald v. Kee- fer	145	Urbana Egg Case Co. v. Ny- pano Ry.	321
State ex rel Lander v. Pres- tien	289 and 497	Utica & Homer Telephone Co., Reynard v.	191
State ex rel Locher v. Horner	449		
State ex rel Morton v. Rapp .	1	Windisch v. John Chapman Co.	62
State for use of, v. Keifer ..	41	Withrow v. Boone	506
State Liquor License Board, Hockett v.	417		
Straka v. State	554	Youngstown, Goeppinger v. . .	519
Stern v. Columbus	353		
Stuebe, In re	401	Zepf & Co. v. Dye	443
		Ziegler, Cincinnati v.	169
Taylor v. Crow Motor Car Co.	557		

OHIO NISI PRIUS REPORTS

NEW SERIES—VOLUME XVI.

CAUSES ARGUED AND DETERMINED IN THE SUPERIOR,
COMMON PLEAS, PROBATE AND INSOLVENCY
COURTS OF OHIO.

MUNICIPAL REGULATION OF BILL-BOARDS.

Common Pleas Court of Hamilton County.

STATE OF OHIO, EX REL PHILIP MORTON, v. GEORGE W. RAPP, COM-
MISSIONER OF BUILDINGS; AND STATE OF OHIO, EX REL
CINCINNATI BILL POSTING CO., v. GEORGE W.
RAPP, COMMISSIONER OF BUILDINGS.

Decided, January 5, 1914.

*Bill-Board Ordinances—Proper Test for Determining Their Validity—
Protection of the Rights of Property Owners—Police Requirements
Which Are Reasonable and Valid—Requirements Which Are Found-
ed on Aesthetic Ideas Not Enforcible.*

1. The proper test as to the validity of a bill-board ordinance, or the extent to which such an ordinance is valid, is found in the fundamental principle that private property must ever be held inviolate, except in so far as it may be subject to the police power exercised for the health, morals and safety of the community.
2. It is a reasonable exercise of the police power to provide by ordinance with reference to bill-boards; that there shall be an open space of six feet between each bill-board and any adjoining structure or lot line; that there shall be an open space of at least two feet between any two bill-boards; and that no bill-board shall exceed five hundred square feet in area.

3. But it is not a reasonable exercise of the police power to provide that no bill-board shall be nearer to the lot line or any street than the house adjoining the same; or that in no case shall any bill-board be less than fifteen feet from the street line or that no such sign or bill-board shall be erected facing any public park, square, municipal, county or federal building unless a special permit shall have first been issued by the director of public service.
4. While an ordinance relating to bill-boards is without retroactive effect, the building commissioner, in ordering that a board which has been erected within the street line shall be removed, may require that if the board is re-erected within the lot line, the work must be done in such a manner as to conform to valid ordinances in force at the time of its re-erection.

Alfred Bettman, City Solicitor, counsel for the state, cited the following: *Graves & Cusack v. Cincinnati*, 9 N.P.(N.S.), 466; *Minter v. Bradstreet Co.*, 174 Mo., 444; *Campbell v. Nonpareil Co.*, 75 Va., 192; *Stewart v. Vandevort*, 34 W. Va., 524; *Walcutt v. City of Columbus*, 27 C. C., 238; *Van Fleet v. Van Fleet*, 49 Mich., 610; *Cranor v. School District*, 151 Mo., 119; *Rogers v. Lynch*, 44 W. Va., 94; *Wright v. Southern Ry. Co.*, 80 Fed. Rep., 260; *State v. Towery*, 143 Ala., 48; *Central R. R. v. State*, 104 Ga., 831; *McFarland v. Donaldson*, 157 Ga., 567; *Barker v. State*, 118 Ga., 35; 2 *Dillon on Municipal Corporations*, 5th Ed., 591; *Gunning v. St. Louis*, 127 S. W. Rep., 929; *Ex parte Savage*, 141 S. W. Rep., 244; *In re Wilshire*, 103 Fed. Rep., 620; Section 3537, General Code.

Millard Tyree, counsel for relators, cited: *Crawford v. Topeka*, 51 Kan., 756; *Yates v. Milwaukee*, 10 Wall., 487; 1 *Dillon on Municipal Corporations*, 374; *People v. Green*, 85 N. Y. (App. Div.), 400; *Bill Posting Co. v. Atlantic City*, 71 N. J. L., 72; *Passaic v. Patterson Bill Posting Co.*, 72 N. J. L., 285; *Bryon v. Chester*, 212 Pa., 259; *Commonwealth v. Boston Advertising Co.*, 188 Mass., 384; *State v. Whitlock*, 149 N. C., 543; *Varney & Green v. Williams*, 155 Cal., 318; *People v. Murphy*, 195 N. Y., 126; *Curron Co. v. Denver*, 47 Colo., 221; *Chicago v. Gunning System*, 213 Ill., 623 (affirming 114 Ill. App., 377); *Haller Sign Works v. Physical Culture Training School*, 249 Ill., 436; *Mugler v. Kansas*, 123 U. S., 661; *Austin v. Murry*, 16 Pick. (33 Mass.), 126; *St. Louis v. Hill*, 116 Mo., 527; *St. Louis v.*

1914.]

State, ex rel, v. Rapp.

Gunning Co., 137 S. W. R., 929, and the dissenting opinion of Graves, J.

GEOGHEGAN, J.

The first cause as well as a number of others involve in the main the same principles and will therefore be considered together. The second case involves somewhat different principles and will be considered separately.

The relators in each case seek to compel the defendant to issue to them permits to erect certain bill-boards which they claim comply with the ordinance of the city of Cincinnati commonly known as the building code, except as to certain provisions thereof which the relators claim are unreasonable and void and contrary to their constitutional rights in their enjoyment of their property. The sub-sections of the ordinance about which they complain as sub-sections (e), (f), (g), (h) and (i) of Section 455 of the Building Code. which read as follows:

(e) "There shall be an open space of six (6) feet between each bill-board and any adjoining structure or lot line."

(f) "There shall be an open space of not less than two (2) feet between any two bill-boards."

(g) "No bill-board shall exceed five hundred (500) square feet in area."

(h) "No bill-board shall be nearer to the lot line on any street than the house adjoining the same."

(i) "In no case shall any bill-board be less than fifteen (15) feet from such street line."

Sub-section (s) under Section 455 provides:

"Each of the foregoing lettered sections relating to signs and bill-boards is hereby declared to be independent of every other section and the invalidity of any one shall not invalidate any of the others."

In the consideration of the propositions involved in these cases I have made an exhaustive examination of all the authorities presented in the able briefs for the relators and of counsel for the city. It would not be profitable, however, in this opinion

to comment upon them or cite them. The judicial literature upon the subject of bill-board ordinances has grown apace in this country within the past few years, and any one who desires to read the various conflicting views that have been expressed upon the subject may find some reward for his industry in the examination of the cases which are appended to this opinion.

The cardinal principle of construction involved herein is that private property shall ever be held inviolate but subservient to the public welfare, and the public welfare is protected by the exercise of the police power reposed in each state when such police power is exercised for the benefit of the health, morals or safety of the community and in the conservation of the general welfare. In so far as the aforesaid sections are necessary in their restrictions for the safety, health and morals of the community, they are valid. In so far as they are not necessary for this purpose, they are invalid. In order to determine, therefore, whether they come within or without the pale of these rules their reasonableness in view of the general welfare must be inquired into.

In my opinion sub-section (e) requiring an open space of six feet between each bill-board and any adjoining structure or lot line is a reasonable exercise of the police power of the state. The authorities have all recognized the right of the state, or the municipality acting under authority granted by the state, or in its own inherent right, to adopt such regulatory measures as will prevent the inception and progress of fires, the abatement of nuisances and such other things as conduce to the public health, safety and morals. Now it is a matter of common knowledge that bill-boards erected entirely across vacant lots, and covering the entire space of said lots, are dangerous in time of fire in preventing egress and ingress of persons trying to reach adjoining buildings, and further, they are not conducive to public health and morals, in that by so enclosing a lot, they furnish a refuge for the vicious and immoral. This regulation does not unreasonably restrict the use of property, but allows the property to be used for any purpose that the owner desires.

1914.]

State, ex rel, v. Rapp.

even in the erection of a so-called bill-board so long as the bill-board is not so constructed as to entirely cover the frontage of the lot. It is true that in the enforcement of this restriction the space for the erection of bill-boards may be confined to very narrow limits, but the property owner still has the right to use the property for the erection of a bill-board, the difference in degree not being a matter of concern in the eye of the law. Whatever doubt one may have as to the reasonableness of this provision, that doubt should be resolved in favor of the law rather than against it. I am therefore of the opinion that sub-section (e) is not so unreasonable in its operation as to unduly infringe upon the property rights of the owner of the property.

Sub-section (f) provides that there shall be an open space of not less than two feet between any two billboards. The same reasons that impel me to declare sub-section (e) to be a reasonable restriction will be equally applicable to sub-section (f), together with the additional fact that a space between separate bill-boards for ready access to the police or fire departments to locations behind bill-boards are conducive to the public safety and morals, which access would be prevented by a long unbroken line of bill-boards or fences.

Sub-section (g) provides that no bill-board shall exceed more than five hundred square feet in area. This I regard as a reasonable restriction. In the first place, to permit a bill-board to be extended for great distances would be interfering with the access of the police and fire departments referred to above. In the second place, the restrictions as to size, character and construction of buildings have been uniformly regarded as within the proper province of the police power of the state, and as long as the restrictions are reasonable it is not within the jurisdiction of courts to interfere with their exercise. It does not seem to me that this provision, which in the light of other provisions of the ordinance, allows a board at least fifty feet long, is so unreasonable as to render it void as being an invasion of the constitutional rights of the owner.

Sub-section (h) provides that no bill-board shall be nearer to the lot line on any street than the house line adjoining the

same. To my mind this provision is clearly unconstitutional. I can not conceive of any fact or state of facts that would make this restriction necessary in the exercise of the proper police power of the state. It seems to have been drafted purely with an eye to the the aesthetic and to preserve a continuity of bill-boards on the front line of house upon the same street. The only advantage that can be gained by such a provision is the advantage to the adjoining property owner in not having an adjoining bill-board placed out further than he desires to place the front line of his house. In other words, it compels a man erecting a fence or bill-board to do it where his neighbor dictates. This is entirely contrary to the doctrine laid down in *Letts v. Kessler*, 54 Ohio St., 73, which in effect holds that a man may build a fence where he likes, from motives of unmixed malice and with entire disregard of the feelings of his neighbor.

Sub-section (i) provides that in no case shall any bill-board be less than fifteen feet from such street line. My colleague, Judge Dickson, passed upon this provision on January 20, 1913, in the case of *State of Ohio, ex rel, v. Rapp*, 14 N.P.(N.S.), 126. I am entirely in accord with the views that he expressed in discussing this very same proposition, and therefore hold with him that the only design of such a restriction is to beautify the community at the expense of the property owners' rights rather than to promote the public health, safety or morals, in the proper exercise of the police power of the state.

I am well aware of the fact that a great many good people throughout the United States have been endeavoring for years to ameliorate the unsightly conditions caused by the indiscriminate erection of so-called bill-boards. However, when the question of constitutional rights of property are involved these rights can not be determined upon purely aesthetic grounds. Under our Constitution each individual is permitted in so far as the single question of the city beautiful is concerned, to adopt what is dictated by his own good taste and sense of the beautiful. If individuals allow their public spirit to be overcome by their desire for gain, legislative bodies can not restrain them, except in so far as the public welfare, as determined by the cardinal principles spoken of above, is subserved.

1914.]

State, ex rel, v. Rapp.

Therefore, the demurrers filed by the city to the application for writs of mandamus in the various cases will be sustained, it appearing upon the face of the petition that the building commissioner properly refused to grant the permits applied for because of the fact that in each instance the proposed construction violated one or the other of the restrictive provisions of the ordinance hereinbefore found to be valid and reasonable.

The cases are numbered on the docket of this court as Nos. 154437, 154438, 154439, 154440, 154441, 154442, 154443, and 154444.

Coming now to consider the principles involved in case No. 154322, the petition recites that for many years prior to the enactment of any ordinance providing for permits for erecting bill-boards, relator's predecessor in title maintained a bill-board about 180 feet long by 10 feet in height facing Central avenue in the city of Cincinnati, and 80 feet long by 10 feet in height, facing Eighth street, said bill-boards being at the intersection of said two streets and forming one continuous board; that said bill-board was built about ten inches beyond the lot line and in the street or sidewalk; that the relator was notified to take same off of the streets of the city; that it applied for a permit to remove it over and set it back off of the city's property, but that the building commissioner refused to grant the permit unless in its removal and subsequent erection it was erected so as to comply with the provisions of the building code, some of which have heretofore been referred to. He further recites that in removing said board it will not be necessary to demolish it, but that it can be moved back intact by simply excavating back of all the upright supports to such a distance as is necessary to place it off of the city's property.

On June 10, 1913, the city of Cincinnati passed an ordinance providing in effect that where any one desires to move a bill-board he shall obtain a permit to do so, and this permit shall only be granted upon the condition that the relocated board shall comply with the provisions of the ordinance relating to the construction and maintenance of bill-boards.

Now to me, there seems to be nothing unreasonable about this provision with reference to the relocation of bill-boards.

Certainly when one considers the familiar legislation with reference to the blocking of squares it would seem that an owner would not have a right to remove a frame structure from one lot in a place where frame structures might be permitted, to a place where, under the exercise of the police power the legislative body of the municipality has declared that wooden structures shall not be allowed. The city certainly has the right to order the removal of structures that are being maintained without right upon its property, and it has a right to provide that in the relocation of bill-boards the ordinance relating to the construction and maintenance of bill-boards in so far as it is valid, shall be complied with. There does not seem to me to be any vested right in an owner to keep a bill-board intact, no matter to what place he desires to remove it. While it may be true that the ordinance providing for the erection of bill-boards has no retroactive effect, I do not think that this doctrine can be extended so far as to apply to a bill-board previously erected, when there is a desire or necessity of removing it to some other place. To hold otherwise would defeat, to a very appreciable degree if not entirely, the valid provisions of the bill-board ordinance itself, and practically render them nugatory.

It also appears from the petition that this bill-board, as proposed to be relocated, will violate sub-section (i) which reads as follows:

“No such sign or bill-board shall be erected on or facing any public park, square, municipal, county, or federal building, unless a special permit shall have first been issued by the director of public service.”

This bill-board on the Eighth street side faces the city building; however, the invalidity of this provision is apparent upon the mere reading of it. It can not be said that it in any way affects the general welfare or public safety, health or morals to have a bill-board facing the public places described in the sub-section. This sub-section must have been framed and passed from purely aesthetic reasons and is therefore invalid.

Therefore, in so far as the application to remove the bill-board did not contain specifications in accord with the valid provisions

1914.]

Estate of Balbo.

of the so-called bill-board ordinance, the building commissioner was right in refusing to grant the permit, and the fact that the said specifications did not in certain instances comply with the valid provisions of the ordinance appearing upon the face of the petition, the demurrer will be sustained.

Counsel will prepare orders in conformity with the foregoing findings.

ADMINISTRATION OF ESTATE OF DECEASED ITALIAN.

Probate Court of Stark County.

IN RE ESTATE OF ROCCO BALBO, DECEASED.

Decided, February 19, 1914.

Estates of Decedents—Administration of, Where the Deceased is a Subject of the King of Italy—Notice—Right of Appointment—Section 10617.

1. There is no requirement that notice be given to the Italian consul of application for administration on the estate of a deceased Italian subject, where the applicant for letters is a brother of decedent and a minor son of the decedent is in court consenting thereto.
2. An Italian consul has no paramount and exclusive right to appointment to administer the estate of a deceased subject of his government, dying intestate and without next of kin in the jurisdiction of the court, but on the contrary he is relegated to the fourth class by the provisions of Section 10617, General Code of Ohio.

KRICHBaum, J.

Opinion on motion by Nicola Cerri, Royal Italian vice-consul, to remove Domenico Balbo, administrator of Rocco Balbo, and have himself appointed in his stead.

On the 3d day of November, 1913, one Rocco Balbo, presumably a citizen of Italy, on account of accidental personal injury, died in Stark county, Ohio, without a will, and without any estate whatsoever.

On the 11th day of November, 1913, decedent's brother, Domenico Balbo, accompanied by decedent's minor son, Cona

Balbo, aged eighteen years, made application for letters of administration, for the purpose of adjusting and compromising claim for wrongful death of decedent, Rocco Balbo, for the benefit of the wife and children of decedent under and by virtue of Section 10,772, General Code of the state of Ohio.

On the same date letters of administration were granted on the application made, and on the same date immediately thereafter, application to the court was made for approval of settlement for wrongful death of decedent, for the sum of \$1,500, which order was granted and an order of distribution made as follows, to-wit: \$93, funeral expenses; \$7, probate court costs; \$200, attorney fees; \$700, to widow of decedent, Angela Balbo; \$100, to Cona Balbo; \$100, to Brigida Balbo; \$100, to Guiseppa Balbo; \$100, to Tersea Balbo; \$100, to Salvatore Balbo.

Said administrator was ordered to forward said \$700 and said \$400 to Angela Balbo, widow of decedent, for the benefit of herself and children, to Catalena, Italy, a receipt for which, signed by Angela Balbo, for her herself and minor children, is now on file in this court.

Subsequently, to-wit, on the 24th day of November, 1913, Nicola Cerri, Royal Vice-Consul of Italy, residing in Cleveland, Ohio, filed his motion in this court to revoke said letters of administration, to remove said administrator Domenico Balbo, to vacate and set aside said consent of court to said settlement for wrongful death by personal injury, to hold null and void all action of said Domenico Balbo as administrator, and finally, to issue letters of administration to Nicola Cerri.

Subsequently this cause was argued at length, and elaborate briefs submitted.

It is to be noted that a different state of facts developed on the hearing of the motion, from that claimed originally by the Italian vice-consul in the filing of the motion. Originally it was claimed by the vice-consul that the wife and children of said decedent, were all residents of Italy; whereas, in truth and in fact, Cona Balbo, eighteen years of age, and the oldest son and child of said decedent, was in the United States at the time of the death of decedent, and was in court consenting to the

1914.]

Estate of Balbo.

appointment of his uncle, the brother of decedent, as administrator, as well as the settlement of claim for wrongful death of his father. On this statement of facts, is the Royal Italian vice-consul entitled to the relief asked for?

It is claimed by the Italian consul, that the letters of administration granted to Domenico Balbo, and all the acts done, or attempted to be done by the said Dominico Balbo as administrator, are void and without effect, for two reasons:

First, because the appointment of said Dominico Balbo was made without any notice whatsoever to the said consular office, as provided by treaty;

Second, because both by the law of nations, and as expressed by treaty stipulations, Dr. Nicola Cerri, as the Royal Italian vice-consul, was entitled to the prior, paramount and exclusive right to administer on the estate his deceased national, Rocco Balbo.

The parts of the Italian treaty germane to a discussion of the subject, under both of the above propositions, is as follows:

Article XVI. "In case of the death of a citizen of the United States in Italy, or of an Italian citizen in the United States, *who has no known heir*, or testamentary executor designated by him, the competent local authorities shall give notice of the fact to the consuls or consular agents of the nation to which the deceased belongs, to the end that information may be at once transmitted to the parties interested."

Article XVII. "The respective consuls general, consuls, vice-consuls and consular agents, etc., * * * shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation."

Because of this most favored nation clause, to-wit, Article XVII of Italian treaty, it is contended that Article XIV of the Swedish treaty is applicable, which is as follows:

Article XIV. "In case of the death of any citizen of Sweden in the United States or of any citizen of the United States in the Kingdom of Sweden without having in the country of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the nation to which the deceased be-

longs of the circumstances, in order that the necessary information may be immediately forwarded to parties interested.

"In the event of any citizens of either of two contracting parties dying without will or testament, in the territory of the other contracting party, the consul-general, consul, vice-consul general, or vice consul of the nation to which the deceased may belong, or, in his absence, the representative of such consul-general, consul, vice-consul general, or vice-consul, shall, *so far as the laws of each country will permit*, and pending the appointment of an administrator and until letters of administration have been granted, take charge of the property left by the deceased for the benefit of his lawful heirs and creditors, and, *moreover have the right to be appointed as administrator of such estate.*

"It is understood that when, under the provisions of the article, any consul-general, consul, vice-consul, general, or vice-consul, or the representative of each or either, is acting as executor or administrator of the estate of one of his deceased nationals, said officer or his representative shall, in all matters connected with, relating to, or growing out of the settlement of such estates, be in such capacities as fully subject to the jurisdiction of the courts of the country wherein the estate is situated as if said officer or representative were a citizen of that country and possessed of no representative capacity whatsoever."

Coming now to the question of notice, it will be observed that in case of the death of an Italian citizen in the United States, *who has no known heir*, or testamentary executor designated by him, the competent local authorities shall give notice to the consuls or consular agents.

In view of the fact that the eighteen year old son of the decedent was present in the United States at the time of the death of the decedent, and was in court consenting to the appointment of his uncle, brother of said decedent, it does not seem to this court that the Italian consul was entitled to notice by virtue of the Italian treaty, nor does the Italian treaty seem even to intimate that in any event is he entitled to the notice in order that he may become administrator of his deceased countryman, but to the end information may be at once transmitted to the interested parties. So far as the Italian treaty throws any light upon the question, the eighteen year old son, or the brother of the deceased, is quite as competent to transmit information to the

1914.]

Estate of Balbo.

parties interested, as the Italian consul himself. Nor does the Italian treaty standing alone, give any prior, paramount and exclusive right to administer on the estate of Rocco Balbo.

The Swedish treaty, which it is contended should be read into the Italian treaty, under and by virtue of the most favored nation clause, contained in article seventeen of the Italian treaty, provides among other things:

“In case of the death of any citizen of Sweden in the United States, without having in the country of his decease, any known heirs, or testamentary executor by him appointed, the competent local authorities shall at once inform the nearest consular officer of the nation to which the deceased belongs, of the circumstances, in order that the necessary information may be immediately forwarded to the parties interested.”

It is contended that under this paragraph of Article XIV of the Swedish treaty, the Italian consul was entitled to notice from the Probate Court of Stark County, of the death of Rocco Balbo. Nothing can be plainer to the mind of this court, that if Rocco Balbo had had no known heirs in this country, notice would most certainly have been required. And the reason is plain in order that necessary information might be immediately forwarded to parties interested, for in the event of no known heirs, or testamentary executor by him appointed, the only avenue of information would be through the consular office. Statutes and contracts are to be construed according to the plain import of the language.

This court is therefore of the opinion that the presence of the eighteen year old son of Rocco Balbo, together with his uncle, a brother of the decedent, in court dispensed with the necessary notice to the vice-consul, by virtue of the plain language contained in the treaty, both with Sweden and with Italy.

It is contended by consul that this contention is not well taken, because without notice, the estate of the decedent would not be conserved and protected for the benefit of his legal heirs and creditors. He contends there can be no dispute about this, because he says, the phrase, “known heir,” implies “the reasonable and necessary qualification of a *competent* known heir.”

It may be asked, competent for what? Competent for the administration of the estate? Competent for the purpose of transmitting notice and information to the parties interested? Competent to be an heir and to participate in the distribution of the estate? This court knows of no law by which qualifying words can violently be read into a contract of any kind.

It is contended that any other construction of the treaty's provisions would be destructive of and do violence to the manifest intention of the high contracting parties. In answer to this claim, it may be said, that the intention of the high contracting parties, is contained in the reasonable and common import of the language used, and this is the method of construction which is followed by the Supreme Court of the state of Ohio.

This court does not agree with the contention that where a known heir eighteen years of age, is present in court and consents that his uncle, a brother of decedent, be appointed administrator, that any safe-guards designed for the protection and conservation of the property of aliens, is cast aside, but such situation is the wisest and best of all safe-guards, and this court can not conceive how notice to the consuls, or his intervention in any way could aid in a proper administration of the estate.

It is further urged in support of the contention that *known heir*, means *competent known heir*, by suggesting an extreme probable condition, in language as follows, to-wit:

"Suppose instead of an eighteen year old son being present, we had a child of two years, would it be contended that the presence of such child would dispense with mandatory requirement for notice, or suppose instead of a minor heir, an insane or imbecile heir were present, would it be maintained that under such circumstances notice would not have to be given?"

The answer to this extreme and violent supposition, is the language cited by the attorney for the consul, 100 U. S., p. 493:

"But a court can not add to, alter or amend a treaty for any purpose, by inserting words or clauses."

Moreover, this court is competent to appoint guardians for minors and lunatics, and it is not claimed that a consul could act in that capacity.

1914.]

Estate of Balbo.

It may further be said in answer, that extreme and violent suppositions would do violence to most any statute or contract.

A liberal construction of treaties makes consular officers, aids and helpers to courts in the administration of estates, and presumes that courts will do right and justice under all circumstances.

The Spanish treaty is cited in support of the contention that notice was mandatory in the case at bar, to-wit:

“Consuls shall have under the laws of their country, * * * so far as compatible with local laws, the right of representing the absent, unknown or minor heirs, next of kin, or legal representatives of citizens or subjects, who die within their consular jurisdiction.”

It will be noted that the exercise of the rights enumerated are subject to the *local laws*, that is to say, where the local laws are plain and adequate, there may be no need for the exercise of the right of representation, but in any event it is not plain to the court that the right of representing minor heirs here, means the right to represent the decedent as administrator. It might mean the right to represent the minor heir as guardian, or as next friend, or it might mean to take possession of the property of the minor until a guardian be appointed, or to take charge of the property of the estate until an administrator be appointed, provided, always, it is in harmony with local laws, or it might mean minor heirs, next of kin, etc., *who are absent*, because the language is “the absent minor heirs,” etc. Whatever may be the import of the right to represent the minor heir, it throws no light upon the question of mandatory notice to a consul, when the minor eighteen years of age and the uncle, one of the next of kin, is in court, and where local laws are specific and effective to give all adequate relief.

The further claim is made, that the statutes of Ohio require all parties entitled to administer an estate of a decedent, to have notice; that therefore the consul is entitled to notice. This of course begs the question, and assumes that the Italian consul in the case at bar has a prior, paramount and exclusive right to be appointed administrator of Rocco Balbo. If this contention is

correct, then a discussion of the question as to whether notice is required in this case is futile and nugatory.

It is therefore the conclusion of the court, that under the facts of this case, and applying the rules of construction to the treaties ordinarily applied to contracts, and the authority cited by counsel in 100 U. S., 483, no notice was required to be given to the Dr. Nicola Cerri, the consular officer for the Kingdom of Italy, for northern Ohio.

SECOND PROPOSITION. Has the Italian vice-consul, Dr. Cerri, the prior, paramount and exclusive right to be appointed administrator of estate of Rocco Balbo, under the facts in this case?

A long list of authorities are cited as to treaty power, treaty interpretation and treaty construction, and which contained a correct statement of the law in that regard.

It is not claimed, nor can it be claimed, that the Italian treaty gives the right to Dr. Cerri, to be appointed administrator, but it is claimed, that by virtue of the most favored nation clause contained in Article XVII of the Italian treaty, the treaties of other nations ought to be read into the Italian treaty; notably the provisions of the treaty with Sweden. Moreover, it is claimed, that the treaties with certain other nations, to-wit, Paraguay, Argentine Republic and Spain, are likewise to be considered, so far as they affect the question at issue.

It will be observed on a careful examination of the treaties of the most favored nations, as compared with the treaty with Italy, that they all contain words of limitation upon the rights granted therein, with respect to the settlement of estates of deceased nationals.

Paraguay.—“So far as the laws of each country will permit.”

Spain.—“So far as compatible with the local laws.”

Argentine Republic.—“Conformably with the laws of the country.”

Sweden.—“So far as the laws of each country will permit.”

It is apparent, therefore, that it was the intention of the high contracting parties, of these most favored nations, that local laws are not to be lightly set aside in the construction of these treaties, but that it was rather the intention of the high con-

1914.]

Estate of Balbo.

tracting parties, to make the local laws of the various states of this nation, ancillary and fruitful and adaptable to facilitate and aid in the settlement of estates of deceased nationals dying in this country.

The Supreme Court of California in commenting upon this precise question, in the case of *Estate of Ghio*, 157 California, p. 557, affirmed by the Supreme Court of United States, says:

“It is obvious that such intent (to give absolute right to consuls to administer), is not to be lightly imputed to the Federal Government, and that it can not be allowed to exist, except where the language used in a treaty, plainly expresses it, or necessarily implies it.”

In 120th Minnesota, p. 122, *Austro-Hungarian Consul v. Westphal*, decided December, 1912, it was held after considering under the most favored clause of Swedish treaty, that the language contained in that treaty, “so far as the laws of each country will permit,” with respect to the administration of the estates of deceased nationals dying in Minnesota, is expressly subject to the conditions imposed by the laws of Minnesota. On page 141 of this well considered case, the court says: “We can not think in the absence of clearly expressed intention so to do, that the Federal Government intended to take the matter of administration of foreigner’s estate entirely out of the control of the states.”

If in consideration of the precise question involved in this case, by the Supreme Court of Minnesota, it of necessity held in arriving at its conclusions, to-wit:

“That a deceased national dying in Minnesota, is expressly subject to the conditions imposed by the laws of Minnesota.”

That the language in the treaty with Sweden did not plainly express, or necessarily imply, that a consul or vice-consul, or any of his subordinates, or agents, had the prior, paramount and exclusive right to be appointed administrator of a deceased national.

In arriving at this conclusion, that court must evidently have considered and construed the language, “moreover shall have

the right to be administrator." It is the contention of Dr. Cerri, that this language is in nowise modified or affected by the qualifying words in the same paragraph of the Swedish treaty, "So far as the laws of each country will permit."

It will be found on examination, that the language relied upon, to-wit, "moreover shall have the right to be appointed administrator," is contained in the last paragraph of Article XVI of the treaty with Sweden.

It will be further observed, that the entire paragraph is one continuous sentence. If the language relied upon were in a different sentence, or in a different paragraph, it might then well be claimed that it is in no sense modified by the qualifying words, "so far as the laws of each country will permit."

It is the opinion of this court, that the canons of grammatical and rhetorical construction brings this last clause under the qualification of the words, "so far as the laws of each country will permit." Moreover applying the rules of thought analysis to this single sentence, it would certainly seem strange that the right to temporary possession until appointment of an administrator, should have qualification, and in the same sentence, the right to be appointed administrator, should be left without qualification; or to put in differently, if the consul has absolute right to be administrator, then why qualify his rights to have charge of the property until letters of administration be granted, forsooth, to himself, for certainly the right to administer includes the right to possession and control of the property, and to have charge of it for the benefit of the lawful heirs and creditors of the deceased. This reasoning is sound on the well known axiom of geometry, "that the whole is greater than any of its parts." Is it not therefore apparent that the construction of this sentence (the whole of the paragraph), in the light contended for by Dr. Cerri, does violence to good sense and reason?

Is there no other hypothesis upon which this language can be explained, preserving its unity of thought, and composition, and if so, according to the canons of construction, ought it not to prevail?

1914.]

Estate of Balbo.

Section 10617, General Code of Ohio, provides as follows:

"Administration of the estates of persons dying intestate, shall be granted to some one or more persons hereinafter mentioned, *who shall be residents of this state*, and they be respectively entitled thereto, in the following order, to-wit:" * * *

Consuls and consular agents are not citizens of the United States, and therefore, not of the individual states, and independent of the provisions of the various treaties, and especially in this case, the Italian and Swedish treaty, have no right to be appointed administrator in the state of Ohio, as is apparent from the above section of statute quoted. It will also be conceded, that in common law, they have no right in the state of Ohio, to be appointed as administrators.

A consul is constructively a resident of his own country, and has no standing in our courts, except as it is given him either by statute or by treaty contract.

Now in order that a consul may have standing in a court, he must be given the right to act as administrator, but that right may be conferred right as any other political right, and must be conferred before he can act as administrator.

For instance, the treaty with Sweden, which is claimed to be the most favorable to the consul, provides that the consul, shall, "so far as the laws of each country will permit," and pending the appointment of administrator, and until letters of administration have been granted, take charge of the property left by the deceased, for the benefit of his lawful heirs and creditors.

Suppose nothing further had been added, is it not apparent that the language, "so far as the laws of each country will permit," would prevent his acting as administrator, because the statute of Ohio, says, "administration of the estate of an intestate, shall be granted to some one or more persons, who shall be residents of this state." Now to make it possible for him to be qualified as an administrator, to give him representative capacity and in order to bring him within the provisions, "so far as the laws of each country will permit," the words were added to the treaty, "moreover have the right to be ap-

pointed as administrator of such estate." Clearly therefore, the words, "and moreover have the right to be appointed as administrator," are simply words of qualification of the consul, permitting him to be appointed administrator, otherwise he would be barred by reason of non-citizenship, or non-residence; that is to say, a political right has been conferred upon him, by the language, "moreover shall have the right to be appointed administrator," simply qualifying him with a right, not exclusive, prior and paramount, to be administrator of the estate of a deceased national. That is to say, "moreover shall have the right to be appointed administrator," are not words of limitation upon the authority of the court, requiring the appointment of the consul to the exclusion of some other person, but are words of qualification, placing the consul on the eligible list for appointment of administrator, thus bringing him within the limitations of the laws of this country and state.

This interpretation and construction of the treaty with Sweden, gives cogency and clearness to the sentence constituting the second paragraph of Section XIV. It accords with the theory and decision of the Minnesota Supreme Court, and of *Rocco v. Thompson*, 223d U. S., page 317. Moreover it is to be observed that this theory of interpretation of the effect of the words "moreover shall have the right to be appointed as administrator," of such estate, is clarified and emphasized by the paragraph of Article XIV of the Swedish treaty immediately following, which says in substance:

"That when such consul is acting as executor or administrator, he shall be in such capacity, as fully subject to the jurisdiction of the courts wherein the estate is situated, as if said officer were a citizen of this country, and possessed of no representative capacity whatsoever."

In other words, no discrimination shall be made against him because he is a foreigner or representative of a foreign government, but that this political right is conferred upon him with all its obligations, rights and privileges in common with other citizens of the United States, simply qualifying him as a proper person to receive letters of administration, not to the exclusion

1914.]

Estate of Balbo.

of others, but to have the qualifications to act in common with other citizens of the United States, when the exigencies of the case demand it, and in order not to do violence to the local laws, and in order that the state laws may be thoroughly subordinate to the treaty rights conferred upon aliens.

It is the conclusion of the court therefore, on the theory that the most favored clause in the Italian treaty, carries the provisions of the Swedish treaty (which is still a doubtful question), that it was not the intention of the high contracting parties in the treaty with Sweden, to take away from the state of Ohio, or any other state in the United States, the right of local administration provided by law upon the estates of deceased nationals, and commit the same to the Italian consul, to the exclusion of those entitled to administer as provided by Section 10617 of the General Code of Ohio, and that Dr. Cerri, vice-consul of Italy, is not entitled to the prior, paramount and exclusive right to administer on the estate of his deceased national Rocco Balbo; that under Section 10617, General Code of Ohio, the appointment of an administrator must be made, first, to the husband or widow; second to next of kin; third, to creditors; fourth, to such persons as the court shall think fit; that Dr. Cerri is relegated to the fourth class, for the reason that the laws of this country permit him to be appointed under this class.

And the court having heretofore appointed decedent's brother, Dominico Balbo, at the request of the eighteen-year old son of the deceased national, to-wit, Cona Balbo, and which appointment it finds is regular and in conformity to the statute, and said estate having been fully administered and order of distribution made before the filing of the motion of Dr. Cerri herein, and eleven hundred dollars of the fifteen hundred dollars having been transmitted to Italy to the widow and four of the minor children, and the receipt returned duly signed and authenticated, the motion filed herein by Nicola Cerri, Royal Italian vice-consul, is overruled, and the relief asked for therein denied, the said Nicola Cerri, Royal Italian vice-consul, to pay the costs taxed herein at the sum of five dollars, and exception will be noted in favor of Dr. Nicola Cerri.

**UNFAIR MEANS OF SECURING ATTENDANCE OF A DIRECTOR
AT A BOARD MEETING.**

Superior Court of Cincinnati.

MCLEAN E. REMELIN V. HERMAN BUMILLER, THE BUMILLER-REME-
LIN COMPANY, ANNE BUMILLER AND ALBERT KLEYBOLTE.

Decided, March, 1914.

*Corporations—Director Trapped Into Attendance at Board Meeting—
Action of Majority of Quorum Must be Disinterested—Injunction
Against Putting Into Effect Measures Adopted by an Interested
Minority.*

1. A director of a private corporation can not be trapped into a meeting of the board of directors by fraud or misrepresentation; and though a meeting of such board is held at a time fixed by the by-laws, yet if his presence is necessary to make a majority and if his presence was obtained in the manner indicated, the meeting is illegal, and resolutions passed at such meeting are void and of no effect.
2. It is necessary to the validity of an act of the board of directors of a private corporation that a majority of the quorum of the board shall be disinterested in respect to such act. If a director is personally interested in such act he is disqualified from participating in it, and can not be counted in estimating a quorum.

*Peck, Shaffer & Peck and Floyd C. Williams, for plaintiff.
Horstman & Horstman, contra.*

OPPENHEIMER, J.

This a proceeding in equity to enjoin defendants from putting into effect certain resolutions which were passed at an ostensible meeting of the board of directors of the Bumiller-Remelin Company, held at the office of that company on January 5th, 1914.

The petition alleges that the plaintiff, together with his wife and one C. Lee Downey, are the owners of one-half of the common stock of the Bumiller-Remelin Company, and that de-

1914.]

Remelin v. Bumiller et al.

defendants, Herman Bumiller, Anne Bumiller and Albert Kleybolte, are the owners of the other half, and that the said six persons constitute the board of directors of said company. It is further alleged that since the organization of said company in 1908, no meetings of the board of directors had ever been held, and that it was agreed between plaintiff and Herman Bumiller, who are in reality the owners of the outstanding common stock, that no formal meetings of said board of directors were necessary, and that no meetings should be held except upon notice to all the directors, but that contrary to said agreement, the defendants, Herman and Anne Bumiller and Albert Kleybolte, conspired unlawfully to deprive plaintiff of his interest in the company and of the salary which he received as secretary of said company, and that pursuant to such conspiracy they arranged to hold a meeting without giving notice thereof to plaintiff, his wife or Downey, and that in pursuance to said conspiracy they secured plaintiff's attendance by a false pretense that his presence was desired in the office of said company for other purposes, and that having thus procured his attendance they proceeded to pass resolutions depriving him of his employment by said defendant company, reducing his salary from \$2,600 per annum to \$60 per annum, and that they then proceeded to issue four shares of capital stock to said Herman Bumiller at the par value of \$100 per share, although the real value was in excess of \$200 per share. Plaintiff further alleges that he has no adequate remedy at law and that the rights of himself and other stockholders have been prejudicing by the actions of defendants, and asks that they be enjoined as heretofore stated.

To plaintiff's petition defendants have filed an answer in which they set out that the capital stock of said corporation is \$50,000, of which \$20,000 is preferred stock and the balance common stock, and that of said common stock \$20,000 has been issued at par, as follows: Herman Bumiller, 98 shares; Anne Bumiller, 1 share; Albert Kleybolte, 1 share; McLean E. Remelin, 98 shares; Mrs. M. E. Remelin, 1 share; C. Lee Downey, 1 share. Defendants further state that the by-laws of the corpora-

tion provide that regular meetings of the directors of said company shall be held on the first Monday of January, April, July and October of each year at 4 o'clock P. M.; that after the organization of said company in the year 1908, at a meeting of the board of directors the salary of Herman Bumiller and McLean E. Remelin was fixed at \$50 per week each, and that said Herman Bumiller was designated as general manager to take charge of the business of said company, employ the necessary heads of departments, and perform all other duties required of him by the board of directors; that on the first Monday of January, 1914, which is the date of the alleged meeting set out in plaintiff's petition, a meeting of the board of directors was held at the office of said company, a majority of the directors being present, and that the resolutions referred to in plaintiff's petition were duly presented and adopted by said board, a majority of said board being at all times present and a majority of said majority voting in favor of each resolution. Included in said answer is an account of the proceedings of said alleged meeting, which it is said, said defendants Herman and Anne Bumiller and Albert Kleybolte have signed and certified as the correct minutes of the proceedings of said meeting of the board of directors. Said defendants admit that the meeting was pre-arranged by them, but allege that it was not necessary for them to give notice to the other directors of their purpose to hold this meeting, which was provided for by the by-laws of the corporation, and deny that it was a conspiracy upon their part to deprive plaintiff of any of his rights. They further allege that plaintiff was present and acted as secretary of the meeting, and charge that their action was the result of long continued gross neglect by plaintiff of his duties as an employee of the corporation. They further allege that part of the consideration for the issuing of four shares of common stock at par to Herman Bumiller was extraordinary service rendered by said Herman Bumiller to the corporation, such service being required largely by plaintiff's failure to perform his duties in the proper manner, and that the consideration for such stock is therefore fair and reasonable. Defendants deny all other allegations of plaintiff's petition and ask for the dismissal thereof.

1914.]

Remelin v. Bumiller et al.

The testimony in the case has been quite voluminous. It indicates that in 1908 said Herman Bumiller and McLean E. Remelin entered into an agreement to purchase the sporting goods department of the Pickering Hardware Company, a corporation which had for many years been engaged in business in this city; that for the purpose of properly handling the deal, a corporation was formed, of which corporation plaintiff and said Herman Bumiller were to have equal control. Each one contributed \$5,000 in cash to the business, and in consideration of such contribution and the turning over to the corporation of the option secured by them from the Pickering Hardware Company, there was issued to each one the sum of \$10,000 in common stock. No other common stock was to be issued, and the stock so issued to them was to be divided in the manner indicated in the answer, so that each one might have an equal voice in the management of the affairs of the corporation and an equal vote in the board of directors. Preferred stock bearing seven per cent. interest was issued to the amount of \$15,000, but a portion of this has been retired, leaving \$12,300 of preferred stock outstanding. By agreement, Herman Bumiller was to be elected president and McLean E. Remelin secretary and treasurer, and their salaries in their respective capacities were to be the same, to-wit, fifty dollars per week. Herman Bumiller was designated as general manager by the board of directors, but it is not clear that there was any difference in the authority of Bumiller and Remelin respectively in the management of the business. It seems that they have conferred from time to time, consulting with each other concerning the employment of help in the conduct of the business, and that the management of the automobile supply and accessory department was entrusted entirely to Bumiller, and the management of the sporting goods department to Remelin. Bumiller testifies that he became dissatisfied with Remelin's conduct about three years ago, and that from time to time he talked with him concerning it, but Remelin, on the other hand, testifies that there were no serious difficulties between them until very recently. It is clear, at any rate, that no meetings of the board of directors were held from the time

when the company was organized until January 5th of this year, a period of more than five years. It appears also that no notice of any intention to hold a meeting was given during that period of time, although it is apparent that occasionally some one of the board of directors would mention the fact that no meeting had been held and perhaps inquire the reason therefor. It is apparent to the court that the only reason for such neglect to hold meetings was that no necessity^d therefor was apparent to anyone, as the affairs of the company were prosperous. Indeed the history of the corporation is somewhat remarkable. Starting with an investment of \$10,000, as heretofore stated, they were able to show a record of gross sales in 1909 aggregating approximately \$108,000, which were increased from year to year, and aggregated in 1913 more than \$168,000. While no complete inventory has ever been taken, plaintiff estimates the value of the stock on hand at \$48,103, and although Bumiller testifies that this statement is doubtless excessive, yet it is clear that the stock is large and of considerable value. Plaintiff further testifies that in his opinion the book value of each share of common stock, taking into consideration the value of the good-will of the business, is in excess of \$300; but defendant Bumiller is of the opinion that this also is excessive. Defendant contends that the cost of conducting the business has increased considerably during the past year, and that this will also affect the value of the stock; and that competition, either present or prospective, will ultimately further reduce its value. So far as the increase in expense is concerned, it may be said that such increase was but natural in view of the higher price of labor, the necessity for more extensive advertising, and other items concerning which testimony was received.

But after all allowances have been made, it is apparent to the court that the business is profitable and that it is decidedly unfortunate that such disputes as these should have arisen between those who were conducting the business.

There is no great discrepancy in the testimony concerning that which transpired immediately before and at the time of the meeting on January 5th, of this year. On or about November

1914.]

Remelin v. Bumiller et al.

25th, 1913, defendant Bumiller consulted his counsel and explained to him the differences of opinion which had arisen. Shortly thereafter the scheme which was put into operation on January 5th, 1914, was conceived. It was planned to arrange for a meeting to be held on that date at which defendants Herman and Anne Bumiller and Albert Kleybolte were to be present, but of which plaintiff, and the other directors who were known to be disposed to support him, were to receive no notice. Three resolutions were prepared in advance by counsel, the first of which was designed to oust plaintiff from his position as an employee of the company and to reduce his salary as treasurer from \$50 per week to \$5 per month. The second resolution provided for the issuing of four shares of the common stock at par to Bumiller, and the third resolution was designed to require the repayment by plaintiff to the corporation of certain overdrafts on his salary which had been made by him. The court is led further to believe by the testimony that the minutes of this meeting were prepared in advance by counsel, or at least that an outline of the proceedings was prepared so that the preconceived program might be properly carried out. On the afternoon of January 5th at about 3:45 o'clock Mrs. Bumiller and Kleybolte appeared at the store and went to the office in company with Bumiller. As the clock approached the hour of 4 o'clock, Minning, the assistant bookkeeper of the company, under the direction of Bumiller, called plaintiff upon the house phone and stated that his presence was desired in the office by Bumiller for the purpose of checking over certain outstanding accounts. In response to this call plaintiff appeared in the office and greeted Mrs. Bumiller whom he had not previously seen. He was then informed that a meeting of the board of directors was being held, it being the time appointed therefor by the by-laws, but that as no business of importance was to be transacted but a few minutes would be required. He asked if such action was legal and was informed that it was. Plaintiff then took a pad or piece of paper and began to make notes, the exact nature of which can not be determined from the evidence, while Kleybolte drew from his pocket the previously prepared

resolutions and handed them to Bumiller, who proceeded to read them. Plaintiff entered an emphatic protest, saying that things should not be "railroaded through" in that manner, and asked that the vote upon those resolutions be postponed until the other directors might be notified to be present. This request was refused, and in spite of his protests the resolutions were passed, Mrs. Bumiller and Kleybolte voting in the affirmative upon each resolution. The meeting was thereupon adjourned. Thereafter the bank was notified that no checks signed by Remelin were to be honored, the lock upon the store was changed, and plaintiff was denied admittance thereto.

Plaintiff immediately consulted counsel, and a meeting was arranged with defendants and their counsel. At this meeting the suggestion was made that an inventory be taken and plaintiff's interest be purchased at a valuation to be shown by such inventory. This suggestion was rejected, largely because the taking of an inventory would require a considerable length of time, and meanwhile plaintiff was to be deprived of any right to participate in the business affairs of the company. Bumiller then offered plaintiff \$110 per share for his stock. Plaintiff refused to accept this offer, but made a counter-offer to Bumiller of \$150 per share for his holdings and agreed to sell his own holdings at the same price. This offer was rejected by Bumiller, and the petition in this case was then filed.

The mere statement of the foregoing facts would, it seems to us, necessarily carry with it the answer to the question which the court is asked to determine. Corporate business and powers are conducted and exercised by a board of directors, who are elected in accordance with statutory requirements and who serve for a period fixed by the by-laws or regulations of the corporation or until their successors are elected and qualified. Ordinarily the courts will not interfere with the manner in which the directors conduct the affairs of a corporation, but they are bound to exercise perfect good faith in dealing therewith. *Peter v. Mfg. Co.*, 56 O. S., 181; *Railway v. Kleybolte*, 5 N.P.(N.S.), 536.

The majority of the directors of a corporation constitutes a board which is empowered to transact the affairs of the corpora-

1914.]

Remellin v. Bumiller et al.

tion (General Code Ohio, Section 8664; 2 Thompson on Corporations, 2d Edition, Section 1150). Where the time and place of meeting of the board of directors are fixed by some by-law or regulation of the company, no notice of such meeting is ordinarily necessary (2 Thompson on Corporations, 2d Edition, Section 1131). And when a meeting of the board of directors is properly held, a quorum being present, a majority of such quorum may ordinarily pass such resolutions and transact such business as may come before it, even though such majority be not in fact a majority of the entire board of directors (3 Cook on Corporations, 7th Edition, Section 713a; *Sargent v. Webster*, 13 Metc. [Mass.], 497; *Gumaer v. Cripple Creek Company*, 40 Colo., 1).

It is essential, however, that the meeting be one which all directors have had the privilege of attending. A mere accidental assembly of the majority of the persons who constitute the directors of a corporation does not make a legal board (2 Thompson on Corporations, 2d Edition, Section 1153). And the majority must be present without fraud or attempt at surprise. *Lookwood v. Bank*, 9 R. I., 308; *Trandley v. Railroad*, 241 Mo., 73.

In the case last cited, the court says (page 94):

“There is no legal process by which a director of a private business corporation can be forced to attend a meeting, and he can not lawfully be compelled by physical force to attend nor can he be entrapped into an attendance against his will.”

Applying the principles just stated to the facts in the case at bar, we are constrained to hold that the meeting of the defendant corporation held on January 5th, 1914, was illegal, and that the resolutions passed at said meeting were null and void. No meeting had been called for more than five years, and there is nothing in the testimony to indicate that plaintiff had any reason to believe that the meeting was to be called. Indeed the testimony—particularly that of Bumiller and his wife—indicate that the arrangements for the meeting were surreptitiously made, and it was expressly desired that no notice there-

of be brought to the attention of the plaintiff or his associate directors. Mrs. Bumiller states that she was notified of the meeting several days, or perhaps a week before it was held; that she knew in a general way what action was contemplated; that copies of the proposed resolutions were handed to her so that she might familiarize herself with them; that her husband stated to her that he desired to get plaintiff out of the business and that she knew that was the purpose of the meeting; and that she understood that neither Mrs. Remelin nor Mr. Downey would be notified of the meeting and did not expect them to be there. This testimony is not merely supported by the testimony of the other defendants, but is also borne out by all the circumstances of the case. And when the time for the proposed meeting actually arrived, the attendance of the plaintiff was not even left to chance; his presence was secured by a deliberate misrepresentation which indicated a total absence of that good faith and honesty which are absolutely essential to the proper conduct of the affairs of any corporation. When defendant Bumiller, in the course of his cross-examination, was asked whether he had told Minning to call plaintiff to the office for the purpose of looking over old accounts, he admitted that he did so. He further admitted that when Remelin actually came to the office in response to this call, he said nothing about any old accounts, but proceeded to tell him that a meeting had been called. When asked why he did not say anything about the old accounts he replied: "That was my business." And when asked, "You want the court now to understand that it is your business why you said nothing about the old accounts?" he replied in the affirmative.

This is scarcely the attitude which should be assumed by one who is asking a court of equity to place its stamp of approval upon his actions. The court is justified in expecting litigants to be frank and fair; and it can not be favorably impressed with a story told by a witness who refuses to offer any explanation for an equivocal act save that the reason therefor was "his own business" with which the court could not be concerned. Indeed the actions of defendants throughout manifest a lack of

1914.]

Remelin v. Bumiller et al.

that integrity and good faith which are entering more conspicuously into the conduct of modern business. Defendants manifestly sought to carry out their unconscionable plan without interference, and they knew that if notice of the meeting of January 5th were given to plaintiff or to his co-directors, their plans would be thwarted. They therefore resorted to methods which do not appeal to the conscience of this court, and if the rights of directors and stockholders are to be protected, the duty of the court is plain. We shall not dignify defendants' contention by citing authorities to show that a court of equity has this power.

The action of defendants in attempting to issue to Bumiller common stock at par is another evidence of the highhanded and unprincipled manner in which they were determined to proceed. Bumiller's action in subsequently offering \$110 per share for the stock held by plaintiff indicates that he himself admitted that the value was, in excess of \$100; and the allegation of the answer that extraordinary service rendered by him to the corporation was part of the consideration for the transfer of the stock, was evidently an afterthought, for no mention of extraordinary service was made in the resolutions which were so carefully prepared before the meeting was held, nor is there any evidence to indicate that anyone thought of such extraordinary service at the time when the transfer was attempted. Moreover, the offer made by plaintiff and his counsel, both before and during the trial to pay Bumiller \$150 per share for his stock is further evidence of the true value thereof.

Even if we were to assume that the meeting was properly held, this action of the board could not be sanctioned. It is essential that a majority of those constituting a quorum of the board of directors of a corporation shall be disinterested in respect to the matters which they vote upon, and as Bumiller's own vote was necessary to pass this resolution, it was absolutely void. 1 *Beach on Corporations*, Section 276; 2 *Thompson on Corporations*, 2d Edition, Section 1157; *Smith v. Association*, 78 Cal., 289; *Miller v. Ice Company*, 93 Mich., 97; *Copland v. Manufacturing Company*, 47 Hun., 235.

It will be noticed that we do not refer to plaintiff's testimony that he refused to vote upon the resolutions presented, and to the contention of his counsel that the result of his refusal was to leave the meeting without a quorum. It has been held that a director who is present, but does not vote, is properly counted in the negative (*Commonwealth v. Wickersham*, 66 Pa. St., 134; *Carr v. Rochester Company*, 207 Pa. St., 392; *Stephany v. Glass Works*, 76 N. J. L., 449). Other cases have held that a director who is present but who refuses to participate in the proceedings can not be counted as a part of the quorum (*North Association v. Milliken*, 110 La. 1002). As to this matter we hold merely that where the attendance of a member is obtained by fraud, misrepresentation or deceit, and where, as in this case, he protests against the proposed action of the board, he can not be counted as present. Defendants have testified that no attempt was made by anyone to prevent plaintiff from leaving the room in which the alleged meeting was held. We are not surprised that when plaintiff found what was being done, he remained to protest in preference to leaving defendants to their own machinations.

Judgment that the temporary restraining order heretofore entered in the case be made permanent, and that defendants be restrained from putting into operation, force or effect, the resolutions and proceedings of the alleged meeting of the board of directors of defendant company held on January 5th, 1914, and that plaintiff be restored in all respects to the position held by him with The Bumiller-Remelin Company prior to said alleged meeting.

1914.]

Bisch v. Ralston Co.

LIABILITY FOR THE NEGLIGENCE OF FELLOW-SERVANTS.

Common Pleas Court of Franklin County.

WILLIAM BISCH v. THE RALSTON STEEL CAR COMPANY.

Decided, May 22, 1914.

Master and Servant—Liability for Negligence on the Part of a Fellow-Servant—Where the Master Has Not Paid Into the State Insurance Fund—Assumption of Risk and Contributory Negligence Distinguished—When the Decision of a Higher Court Must be Regarded as a Precedent.

The provision of Section 1465-60 of the workmens' compensation law, that employers "shall be liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employees," has reference to a wrongful act, neglect or default of an employee without regard to the fellow-servant or assumption of risk rule; and it follows that in an action by an employee for injuries suffered through the negligence of a fellow-employee, the only question for submission to the jury is whether the injured servant exercised ordinary care. *Gerthung v. Stambaugh-Thompson Co.*, 18 C.C.(N.S.), 496, distinguished.

Harry Kohn, for plaintiff.

Fred M. McSweeney, contra.

KINKEAD, J.

Plaintiff brings this action to recover \$20,000 for personal injury alleged to have been caused by the negligence of the defendant. The negligence charged is that in putting on and adjusting the punch and die and in testing it to ascertain whether the punch will accurately enter the die when the power is applied. Before using the machine it is claimed that it was necessary to determine whether the punch when lowered would accurately enter the die; that the operator could and should have shut off the power driving the machine and to have accurately lowered the punch into the die to determine whether the punch accurately fitted into the die, but that the operator recklessly, carelessly and negligently failed and omitted to gradually lower the punch

into the die to test it to determine whether it accurately fitted into the die.

The defendant negligently lowered the punch by means of the power applied to the machine and as the punch descended rapidly into or against the die it did not accurately meet or enter therein and struck the side of the die with the result that a piece of steel struck the plaintiff's eye, destroying his sight.

Section 1465-60 makes employers who do not comply with the Workmen's Compensation Act liable to their employees for damages suffered by reason of personal injury sustained in the course of employment caused by the wrongful act, neglect or default of the employer or any of its employers, officers, agents or employees.

The defenses of the fellow-servant rule of assumption of risk and of contributory negligence are taken away.

The injury in this case was caused by Herter, who was a servant of the defendant, engaged in the operation of the punch machine, the plaintiff being a helper. The two men were under the direct control of the foreman named Henry, so that they are to be regarded as fellow-servants. Without regard to what Henry may have said, or without regard to what Herter said, that this man followed his directions the two are to be regarded as fellow-servants, because they were under the general control and supervision of their work of the foreman, and that is the fact that governs.

It is said by the Supreme Court:

"That an employer who elects not to go into the plan of insurance may still escape liability if he is not guilty of wrongful act, neglect or defect. His liability is not absolute. * * * And it can not be said that the withdrawal of the defenses of the assumption of risk, fellow-servant and contributory negligence as against an employer who does not go into the plan is coercive. * * * As to the employee he has his remedy for the neglect, wrongful act or default of his employer or agent before the law is passed." *State, ex rel, v. Creamer*, 85 Ohio St., 347.

In *Gerthung v. Stambaugh-Thompson Company*, 18 C.C.(N.S.), 496, the Mahoning County Court of Appeals held:

1914.]

Bisch v. Ralston Co.

"That though the statute takes away the defenses of the fellow-servant rule, contributory negligence and assumption of risk, it does not enlarge the basis of recovery on grounds of negligence beyond what existed at common law, and the employer is only required to exercise ordinary care under all the circumstances of the case. The only test of liability under the law, it is held, is whether the employer exercised the degree of care that ordinarily prudent persons are accustomed to exercise under the same or similar circumstances."

The court observed that if the act held the employer to a higher degree of care because of its failure to go into the plan of insurance it would seem that the Supreme Court would have referred to that fact and such finding might have led the court to a different decision as to the constitutionality of the act. The court especially disapproves an opinion by Pugh, J., in *Schafer v. The C. B. Company*, 13 Nisi Prius (N.S.), 553, where the Superior Court of Cincinnati held that the defendant's liability prescribed by the statute was not whether the employer exercised ordinary care but whether he was guilty of any wrongful act, neglect or default which caused the injury. The court concluded that neglect or default embraced all neglects or defaults; that to limit them to the mere failure to exercise ordinary care requires a resort to construction; necessitates reading into the language of the statute some qualification not expressed therein.

In *Schwartz v. Columbus Citizen Telephone Company*, this branch of the court of this county made certain rulings in respect to the admission of evidence that is analogous to the questions as they are presented in this case. There the plaintiff was an employee of the telephone company engaged constantly in climbing poles and in doing certain work thereon. He climbed a pole on the day that he was injured to do some work, which pole was rotten at the bottom and it broke, hurling him to the ground and he was severely injured. Evidence was offered to show that the custom and the ordinary rule among such companies, and the regulation of the defendant company was such that no general inspection was ever made of the poles, but that such workman was to do his own inspection by observing

whether the pole was safe before climbing. It was held in that case that such a rule would cast a duty upon the servant which primarily rests upon the master; that it had the effect of compelling the servant by implied contract to assume the risks incident to the obligations which the terms and conditions of the employment cast upon the master. To apply such a rule to the contract of employment it was said would not only relieve the defendant from all duty and obligation but it would be in direct contravention of the statute which deprives the defendant of the claim of defense of assumption of risk.

Now that rule of law was applied by the court only in rejecting certain evidence. But it was applied according to the construction of the statute placed upon it by the court. It was applied in respect to the doctrine of assumption of risk and the duty of the employer just as it is presented in this case. When that case was decided I had not the benefit of the court of appeals decision. I had before me the Cincinnati decision, by Judge Pugh, which I have quoted. But on a motion for a new trial the court of appeals decision of Mahoning county was presented by counsel and on careful consideration this court then decided that that decision did not control; and the view entertained then was that the statute certainly meant something new or it would not have been enacted, and the motion for a new trial was overruled.

It was claimed by counsel in that case that this court was adopting a rule which resulted in an extension of a liability, at least to the extent of ruling out certain evidence which if it had been allowed to go in would have left no liability upon the company. But the case went off finally on the question of actual knowledge of the defective condition of the pole being brought home to a foreman, and the court charged the jury that that knowledge was chargeable under this statute to the master, and the verdict was in favor of the plaintiff and the motion for a new trial was overruled.

So in this case it may be said that under the common law when the plaintiff entered the employ of the defendant as part of his direct employment he impliedly undertook to assume the

1914.]

Bisch v. Ralston Co.

ordinary risk of the negligence of a fellow-servant. The common law rule of care imposed upon the master is measured by his contractual engagement of the servant. The correlative duty and obligation which rested upon the master then was that he should exercise ordinary and reasonable care in the selection of servants and to observe the same degree of care to ascertain and learn of their incompetency during employment.

The courts have not always observed the inherent distinction that exists between assumption of risk and contributory negligence. They are radically different and it is necessary to observe the distinction and especially in a case like this in construing the statute. The matter of assumption of risk is a part of the contract of employment. There is no negligent act involved in the doctrine at all excepting as may arise when the servant becomes aware of some defect or of some incompetency of a fellow-servant and sleeps on his rights; then you may characterize that conduct of his, if you please, as negligent. But I would rather characterize it as estoppel; whereas the contributory negligence is pure negligence, and it arises at the time of the commission of the act, and has no antecedent predicate at all as assumption of risk has.

The duty of the master is based upon the implied obligation of the servant in assuming certain risks of his employment. The conduct of the servant, unlike that of contributory negligence, is contractual in character rather than tortious.

There is no complaint made in this case concerning the incompetency of the servant of whose negligence plaintiff complains. There probably could be none, as he had experience in shops where similar machines were used and worked on them. He knew the die and the punch had to be tested before used; he evidently did not do it in the safest way.

In *Gerthung v. Stanbaugh-Thompson Company, supra*, the negligence charged was in not furnishing a proper horse to drive—analogous to not furnishing safe appliances. Such a charge does not compare with the one here so far as it involves the application of the statute, because the attitude and duty of the plaintiff in that case had no connection with or dependency

on the driving of the horse whatever, excepting as he might be guilty of contributory negligence, which is a new and independent act having no relation to the doctrine of assumption of risk; so that the court could not have had in mind the question as it is presented here.

The conduct and attitude of the plaintiff in this case dovetails in with the obligation of the defendant concerning the negligent act involved.

To give the construction to the statute adopted by the Mahoning County Court of Appeals and to apply it in this case would be to relieve the defendant from all responsibility, because there is no proof that it failed in its duty in selecting the servant, and being a fellow-servant the master owed no duty in respect to his ordinary acts of carelessness because under the common law they are assumed by the servant. It seems to be the plain purpose and intent of the statute to impose a liability.

Ordinary and reasonable care in respect to the common law duty of defendant applies to nothing else in this case than in the selection of the servant and in ascertaining and learning whether or not the servant during the course of the employment becomes incompetent.

It seems clear from what has been stated that the opinion of Johnson, J., in *State v. Creamer*, *supra*, could not have contemplated the question which is presented here so that the *dicta* contained in that case is not regarded as of binding force here.

So may it be said that the act of furnishing an unsafe horse to drive, as in *Gerthung v. Thompson Company*, the court of appeals in announcing the rule could not have had in mind the situation such as this case presents, where the common law obligation of the master and that of the servant form a composite whole constituting the contract which they entered into according to the common law doctrines.

It must then be concluded that the provision taking away "the fellow-servant rule, and the defense of assumption of risk" from the employer who does not comply with the law results in abrogating part of the doctrine applicable to an employment between master and servant. The fellow-servant rule, the defense of the

1914.]

Bisch v. Ralston Co.

assumption of risk as the language used in the statute, mean the same thing. Assumption of risk and contributory negligence are wholly different kinds of defenses. As already explained, the former involves contract, and where he sleeps on his rights there is a shade of negligence added. The latter is negligence pure and simple.

So when we read Section 1465-60 that the employers "shall be liable to their employees for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employers, officers, agents or employees," it must have reference to a wrongful act, neglect or default of an employee without regard to the fellow-servant or assumption of risk rule, because that is taken away and the plain language of the statute makes the employer liable for the wrongful act or negligence of the employee without regard to the rule of the assumption of risk. Thus applied, as it seems the statute must be to give all its parts force and effect, in a case like this the result is an imposed or an increased liability. By adopting such a construction full effect is given to all provisions of the statute. Adopting the construction of the court of appeals would require the application of the common law as it has been in respect to master and servant and the assumption of risk doctrine, with the result that though assumption of risk may not be pleaded, as it is not in this case, still by applying the rule of common law as announced by the court of appeals it would be giving the defendant the benefit of the defense of assumption of risk, which is forbidden by the statute.

While under the Constitution the decision in the court of appeals in this state is binding upon this court, still no decision of any higher court is to be regarded as precedent unless the doctrine announced, though purporting to be of general application, may nevertheless be consistently applied to similar conditions and facts. The rule of the defendant's liability adopted by the court of appeals is entirely consistent with the duty of ordinary care in furnishing safe appliances or a safe horse to drive. The statute does not at all change the rule in respect to that kind

of an act. But in the present case it must result in a change or else the statute can not be given full effect.

The conclusion is that the employer is liable for the negligence of any employee whether he be a fellow-servant or not. This is the penalty to be paid by the employer for non-compliance with the statute. It is intimated by the court of appeals that the Supreme Court would probably not have held the law to be constitutional if it was supposed to have prescribed a higher degree of care, and the Supreme Court thought the withdrawal of the defenses not to be coercive. Nothing seems plainer than that it is coercive and that such was the purpose and intent. Whether that has anything to do with the constitutionality of the law is not for this court now to decide. It is supposed that the Supreme Court took into consideration all contingencies that might arise when it held the statute constitutional. In this case I am assuming that the law is constitutional. I can see no other consistent position to take in this case. It is not my innovation, but it is that of the Legislature. Otherwise his case would give the defendant the benefit of the assumption of risk doctrine, when the effect of the statute is to obliterate part of the rule which was a competent part of the doctrine that is to be applied to the duty of the master.

This leaves nothing but the question whether or not this servant observed ordinary care in the work in which he was engaged, to be submitted to the jury.

The motion for non-suit is overruled.

1914.]

State v. Keifer, Administrator.

A FINE NOT COLLECTIBLE FROM ESTATE OF A DECEDENT.

Common Pleas Court of Clark County.

STATE OF OHIO, FOR THE USE OF CLARK COUNTY, v. MORACE C.
KEIFER, ADMINISTRATOR.*

Decided, 1913.

*Fines—Action Against Administrator of the Offender for Recovery of
an Unpaid Fine—Not a Debt Within the Administration Act—
Estate Liable for Costs Assessed When Fine Was Imposed.*

1. Where a fine has been imposed by a court against a defendant on his conviction of a criminal offense, and the defendant dies before collection of such fine, or any part thereof, and before the same has been levied upon property of the defendant, such fine can not be collected from his estate after his death.
2. In such case, where the costs of a criminal prosecution resulting in such conviction of the defendant are adjudged against him, but not collected during his life, and not levied upon his real or personal property, the same are collectible against his estate after his death.

Charles E. Ballard, Prosecuting Attorney, cited the following authorities for plaintiff: *Insurance Company v. Bank*, 173 Fed. Rep., 390; *Walsh, Lessee, v. Rainer*, 2 Ohio, 327; *United States v. Mitchell*, 163 Fed., 1014; *United States v. Dunne*, 173 Fed., page 255; *United States v. Pomeroy*, 182 Fed., 279; *United States v. N. Y. C. R. R.*, 164 Fed., 324; *State v. Fisher*, 15 Pac. Rep., —; 66 Pac. Rep., —.

Keifer & Keifer and Stafford & Arthur, for defendant, cited the following authorities: *Musser v. Steward*, 21 Ohio State, 356; *Turner v. Wilson*, 49 Ind., 584; Vol. 8, *Encyl. of Law*, 2 Ed., 997; *State v. Mase*, 5 Md., 337; *In re Moore*, 6 Am. Bank Rep. 590; *Collier on Bankruptcy*, page 120; *Loveland on Bankruptcy*, page 835; *Boyd v. State*, 108 Pa., 431; *United States v. Pomeroy*, 152 Fed. Rep., 279; *United States v. Mitchell*, 163 Fed., 1014; *United States v. Dunne*, 173

*Affirmed by the Court of Appeals without opinion.

Fed., 255; O'Sullivan v. People, 144 Ill., 64; Harrington v. State, 53 Ga., 552; Hicks v. McGovern, 144 Mo. App., 544; State v. Fisher, Administrator, 15 Pa., 66; State v. Elwann, 33 Pa., 548; Massey's Heirs v. Long et al, 2 Ohio, 287; Carney v. Reed, 5th Ohio, 221; G. C., 13723; Dyer v. United States, 186 Fed., 622; Hall v. Coleman, 75 S. E., 1132; State v. Perrin, 56 Mo., 62; State v. Woods, 56 Mo. App., 55; Marsh v. State, 5 Texas App., 450; Harbin v. State, 36 S. W. Rep., 82.

HAGAN, J.

This case was submitted to the court upon a demurrer of the defendant to the third amended petition of the plaintiff, which alleges two causes of action.

By the first cause of action the plaintiff, by Charles E. Ballard, prosecuting attorney of Clark county, Ohio, avers, in substance, the due issuance of letters of administration on the estate of Charles B. Fisher, theretofore deceased; the appointment of Horace C. Keifer, as administrator of said decedent, and his qualification and acceptance of said trust; that on the 6th day of May, 1910, the state of Ohio, for the use of Clark county, recovered a judgment against the said Charles B. Fisher in the juvenile division of the Probate Court of Clark County, Ohio, for the sum of \$1,000, and the costs of prosecution amounting to \$116.58; said judgment being rendered under Section 1654 of the General Code of Ohio; that the same has not since been vacated or reversed and no part of same has been paid, nor has any execution been issued thereon; that a copy of the judgment is as follows, to-wit:

"The court thereupon informed the defendant of the finding of the court that he is guilty, and asked the defendant whether he had anything to say why judgment should not be pronounced against him, and the defendant and his attorney having shown no sufficient cause why judgment should not be pronounced, it is by this court ordered, adjudged and decreed that the defendant be imprisoned in the Xenia work house, at Xenia, Ohio, for the term of one year, and that he pay a fine of one thousand dollars, and the costs taxed herein, and it is further ordered that said defendant be committed to said Xenia work house

1914.]

State v. Kiefer, Administrator.

at Xenia, Ohio, until the fine and costs of the prosecution are either paid or until he be discharged therefrom by allowing a credit of \$.60 per day on such fine and cost for each day of confinement in such work house or he be otherwise legally discharged, and it is ordered that a warrant issue to the probation officer of Clark county, to convey the said defendant to said Xenia work house at Xenia, Ohio, to which the defendant excepts."

It is further alleged that the said Fisher was duly committed under said sentence, judgment and order of said probate court, to the Xenia work house, and was therein detained under said order of committment from July 16th, 1911, until the 19th day of July, 1911, when he died; that on the 19th day of December, 1912, no part of said fine and costs having been paid, said prosecuting attorney presented a claim for said costs, of \$116.58, duly verified, to said administrator, against said estate for allowance, but that the said administrator refused to make such allowance and rejected said claim.

In the second cause of action, the state of Ohio repeats the allegations of the first cause in reference to the appointments of the defendant Horace C. Kiefer, as administrator of said estate, his qualification and acceptance of said trust, and the recovery of a judgment as aforesaid against the said Fisher, and the said Section 1654, and that the said judgment has not been vacated or reversed, or any part thereof paid; the allegation of the first cause of action is also repeated as to the committment of said Fisher to the Xenia work house, and his detention there until his death, as above stated.

It is further averred that the claim for said judgment of \$1,000 was duly verified and presented to said Horace C. Kiefer, as administrator, for allowance by him, and the same was rejected by him, wherefore the plaintiff asks judgment for said sum of \$1,116.58, being the amount of said judgment and costs, with interest.

A demurrer was interposed by the defendant to said petition, to each of said causes of action, and was argued by counsel upon various grounds, but the one ground finally relied upon by the defendant, was that a fine is not a debt, within the provision of

the administration act of Ohio, nor within the contemplation of the constitutional laws of this state; that a fine is the sentence of the court, imposed upon a person as a punishment, for which, under the statutes of this state, in default of payment thereof, the defendant may be committed to the work house, there to stand committed until said fine and costs be paid, allowing him credit at the rate of \$.60 per day thereon; whereas a debt is defined to be an obligation founded upon a contract, express or implied, and unless the claim be a debt within the technical meaning of the term, it is not such as the statute authorizes the administrator to allow or pay.

It is said that a fine thus imposed in no sense arises upon contract, express or implied, and is not a liability created by the assent, either directly or indirectly, of the defendant, but is imposed without his acquiescence, and in this case the record shows he excepted to the judgment and sentence of the court.

The definition which designates a debt as one which arises upon contract, express or implied, is too broad for all purposes, as such a rule would exclude a debt arising upon tort, where judgment has been rendered for the same without the consent of the person against whom the judgment was obtained.

The question is, what is the status of a fine imposed as part of a sentence in a criminal prosecution, as regards whether it is a debt which may be enforced against the estate of the defendant after his death? The question is not settled in Ohio, and decisions of courts without the state are not numerous, but there are a number of adjudications on this subject by respectable authorities.

In the case of *United States v. Pomeroy*, in the circuit court for the southern district of New York, reported in 152 Federal Reporter, 279, decided by Judge Holt in 1907, the question was made. The accused was convicted, in the court below, of giving rebates in violation of the Interstate Commerce act and its amendments, and sentenced to pay a fine, but died after judgment and before the fine was paid.

Judge Holt held that the fine was not a claim enforceable against the personal representatives of the defendant. He said, on page 282:

1914.]

State v. Keifer, Administrator.

“In my opinion the fundamental principle applicable to this case, is that the objects of criminal punishment is to punish the criminal, and not to punish his family. When A recovers a judgment against B for a tort, the recovery is undoubtedly based on the defendant's misconduct; and the fundamental principle upon which the action is maintained is the idea of compensating the injured party; but, when a court imposes a fine for the commission of a crime, there is no idea of compensation involved. In this case the defendant was fined \$6,000. That money was not awarded as compensation to the United States. No harm had been done to the United States. It was imposed as a punishment of the defendant for his offense. If, while he lived, it had been collected, he would have been punished by the deprivation of that amount from his estate; but, upon his death, there is no justice in punishing his family for his offense. It may be said, of course, that there is very little difference between the loss which his family would have sustained if the money had been collected before his death, and the loss which it will now sustain if it collected from his estate. But if the money had been collected before his death, he would have been punished. If it is collected now, his family will be punished, and he will not be punished. In my opinion, therefore, this prosecution should be deemed ended and this judgment abated by the defendant's death.”

The question again arose in the case of *The United States v. Mitchell*, in the circuit court of Oregon, in a case decided in 1908, reported in 163 Fed. Rep., page 1014, in which Judge Wolverton approves the foregoing decision of *United States v. Pomeroy*, and the reasoning upon which that case was based.

The case of *Dyar v. The United States*, reported in 186 Fed. Rep., page 614, was one where a fine for an offense had not been paid at the death of the person fined, but where he had made a deposit of a fund to secure such payment. Nevertheless the court held that the judgment abated with his death, and that not even such deposit could be availed of by way of collection of the same from his estate. Newman, J., rendered the decision, the case being in the circuit court of the United States for the eastern district of Louisiana, and he also approves the opinion of Judge Holt in the case of *United States v. Pomeroy*.

In the case of *Boyd v. State*, in the Criminal Court of Appeals of Oklahoma, decided in 1910, and reported in 108 Pac. Rep., page 431, the court said:

"In a criminal action the purpose of the proceeding being to punish the defendant in person, the action must necessarily abate upon his death and can not be enforced against his personal representative."

The question did not necessarily arise in that case which is present in this, as to the enforcement of a judgment, but the court, by *obiter*, approves the doctrine of the foregoing cases.

In the case of *State v. Ellvin*, in the Supreme Court of Kansas, reported in 33 Pac. Rep., at page 547, the court was reviewing the case below, where a conviction was had against Ellvin for the unlawful sale of intoxicating liquors, and where there had been a stay of execution of the judgment, but before the appeal was heard he died. The court held that the death of the defendant did not abate or destroy the judgment for costs, but that such death necessarily prevented a recovery of the fine imposed as a punishment, and the court further said:

"It has been determined that the costs adjudged against one convicted of crime do not constitute a part of the punishment inflicted upon him, and this although the judgment may provide that he be imprisoned in the county jail until such costs are paid. It was further held that an unconditional pardon would not relieve the party from liability for costs adjudged against him. Such a judgment is merely a means of enforcing the legal obligation resting upon the defendant to pay the costs which he, by his original wrongful act and his subsequent acts has caused to be made, and which have accrued in the prosecution subsequent to the act for which he is punished; and those costs have not accrued to the public merely, but have accrued to individuals, and are given to such individuals as compensation for their services performed in the prosecution. The costs, although incidental to the punishment inflicted, constitutes a separate civil liability in favor of the parties to whom they are due, and from which the estate of the defendant can not be relieved, except by a reversal of the judgment."

On the strength of the authorities cited above, and of others which have been adduced by the defendant, the court overrules the demurrer of the defendant to the first cause of action and sustains the demurrer of the defendant to the second cause of action. Neither party desiring to plead further, judgment will be entered in favor of the plaintiff on the first cause of action, and in favor of the defendant on the second cause of action.

1914.]

Herrmann v. Bank.

TRUST IN BANK DEPOSIT ESTABLISHED BY PAROL.

Superior Court of Cincinnati.

LOUIS P. HERMANN V. THE BRIGHTON GERMAN BANK
COMPANY ET AL.

Decided, March, 1914.

Gifts—Voluntary, Irrevocable Trust Established in Bank Deposit—Where Transfer of Title had Failed as a Gift Inter Vivos—Intention to Create a Trust—Word “for” Construed as Equivalent to “Trustee for”—Notice to Beneficiary Unnecessary.

1. A trust in a fund deposited in bank may be established by parol.
2. Failure to establish by clear and unequivocal testimony an effective transfer of the legal title to a fund, operating as an executed gift *inter vivos*, does not preclude the donee from showing and enforcing a perfected, valid trust.
3. Where B deposited a sum of money in bank in the name of “B for H,” stating at the time to the cashier of the bank that she desired to make the deposit for H, her brother, who was an invalid, and thereafter making other deposits in the same manner, keeping the bank book in a safety deposit box to which she and H had access, *Held*:
 - (a) That the use of the word “for” indicated an intention to create a fiduciary relationship and to constitute herself a trustee of the fund for H;
 - (b) That the effect of the deposit was to pass the equitable title to the fund completely and irrevocably to H, who is entitled to its possession after the death of B; and
 - (c) That notice to H of such deposit was unnecessary, and acceptance by him of the benefit of the trust will be presumed.

S. M. Johnson, for plaintiff.

W. F. Chambers and *J. B. Kelley*, contra.

OPPENHEIMER, J.

The plaintiff, who is an invalid, resided for some time prior to March 18th, 1909, with his sister, Rose B. Boone. On that date Mrs. Boone went to the Brighton German Bank, in this city, and stated to the cashier of that institution that she desired to deposit some money for her brother, who was unable to come to the bank in person. Accordingly a deposit was made

in the savings department in the name of "Rose B. Boone for L. P. Herrmann," and a bank book was issued in the same name.

One of the clerks in the bank testified that at that time Mrs. Boone and plaintiff came to the bank in a buggy; that plaintiff remained outside in the buggy while Mrs. Boone came inside to make the necessary arrangements, and that he (the witness) then went out to the buggy and had plaintiff sign his name upon the identification card. Subsequently he again took the stand and stated that he was not certain whether plaintiff came to the bank and signed this identification card on March 18th, 1909, or in November, 1910, when plaintiff individually opened an account with the same bank. It is probable, however, that plaintiff did visit the bank with his sister on the earlier date, for at the same time Mrs. Boone rented a safety deposit box, and the receipt therefor was signed by plaintiff himself as deputy. Moreover, a description of the plaintiff was written upon the identification card, and there is no reason to believe that this would have been done if plaintiff had not been present, and if there had appeared to be no occasion for it.

Such expert testimony as has been introduced does not aid us in determining whether the name "Louis P. Herrmann" upon the identification card was written by plaintiff himself or by Mrs. Boone. And plaintiff's mental and physical condition is apparently such as to make it impossible for him to assist us in solving this problem in chirography even if his testimony were legally admissible.

No money was ever withdrawn from the bank by Mrs. Boone, but additional deposits were made from time to time in the same account, and the interest upon the deposits was permitted to accumulate until, at the time of her death in 1912, the entire deposit aggregated \$1,046.77. Upon her death the book was found in the safety deposit box heretofore mentioned, to which plaintiff had access as her deputy, and two other books covering deposits in her own name in other banks were likewise found.

Mrs. Boone left a will in which she made a number of bequests, including one of \$1,000 to plaintiff. But her funeral expenses and the expenses incurred in connection with her last illness, together with other debts incurred by her in her life-

1914.]

Herrmann v. Bank.

time, exceeded the residue of her estate. Mrs. Josephine Hunt qualified as executrix under the will, and served in that capacity until recently when she resigned and was succeeded by Joseph B. Kelley, who was appointed and qualified as administrator *d.b.n. c.f.a.*

Plaintiff demanded of the Brighton German Bank the amount of the deposit in dispute claiming that it belonged to him. The bank thereupon interpleaded plaintiff and Mrs. Hunt as executrix, and pending the hearing it was agreed that the deposit should remain in bank and continue to draw interest. Meanwhile Wm. A. Boone, widower of Rose B. Boone, intervened as a creditor of the estate, claiming that unless this deposit is held to pass to the administrator and to be subject to the payment of the estate, he will be personally liable therefor.

We are now called upon to determine whether the deposit of the money by Mrs. Boone under the circumstances related operated either as a gift to Louis P. Herrmann or as a valid, executed trust in his favor. If it did, then the fund must now be awarded to him; if not, it will pass to the executrix or administrator and become subject primarily to the payment of the debts of Mrs. Boone's estate.

It is not suggested that there was any intention on the part of Mrs. Boone to make a gift *causa mortis*. We shall therefore first consider the essentials of a gift *inter vivos*, and endeavor to ascertain whether, under the circumstances indicated by the testimony, such gift was made in this case.

A gift *inter vivos* is an immediate, voluntary and gratuitous transfer of property by one person to another. To constitute a valid gift, the intention of the donor to make the gift must be clearly and satisfactorily established (*Worthington v. Redkey*, 86 O. S., 128). But mere intention, however clearly and positively it may be made to appear, is not sufficient. It must be consummated and carried into effect by such acts as are necessary to divest the donor of all right of property in the *res* which is the subject of the gift and to invest the donee therewith (*Worthington v. Redkey*, *supra*; *Martin v. Funk*, 75 N. Y., 134; *Wadd v. Hazelton*, 137 N. Y., 215). A complete unconditional delivery is essential to the perfection of the gift, but the manner

of delivery will, of course, depend upon the character of the thing which is given. The donor must part not merely with the possession, but also with the dominion and control of the property, and they must thereafter vest exclusively in the donee (*Flanders v. Blandy*, 45 O. S., 108; *Harrison Banking Company v. Miller*, 190 Mo., 640). It is not necessary, however, that the property be physically transferred from the possession of the donor to that of the donee. In some instances the property is already in the possession of the donee who holds it as agent for the donor, and in such case it is sufficient that the donor relinquish all domain over the property and recognize the possession of the donee as being in his own right (*Muir v. Gregory*, 158 Fed., 122; 168 Fed., 641; *Allen v. Cowen*, 23 N. Y., 502; *Newman v. Bost*, 122 N. C., 524). In other instances the property will remain in the possession of the donor, it being sufficient that he cease to hold in his original character as owner and thereafter hold as representative of the donee (*Yonken v. Hicks*, 93 Ill. App., 667; *Martin v. Funk*, *supra*). There are still other cases where the delivery will be made, not to the donee himself, but to a third person as agent or trustee, for the use of the donee, and under circumstances which unmistakably indicate an intention on the part of the donor to relinquish all right to the control of the property and to vest the present title in the donee. *Spray v. Glendinning*, 163 Ill. App., 431; *Jones v. Nicholas*, 151 Iowa, 362; *Vosburg v. Mallory*, 155 Iowa, 165; *Halliday v. Basil*, 170 Mich., 489; *Schauer v. Von Schauer* (Tex. Civ. App.), 138 S. W., 145.

Moreover the property may be of such a character as to make a manual delivery impossible. If such be the case, a constructive or symbolical delivery is sufficient (*Gano v. Fisk*, 43 O. S., 462; *Flanders v. Blandy*, *supra*). There are some cases which hold that, to perfect either a gift or a trust, the beneficiary must be informed of the donor's intention (*Gerrish v. Inst. for Savings*, 128 Mass., 159; *Bartlett v. Remington*, 59 N. H., 364). The weight of authority, however, favors the proposition that knowledge on the part of the beneficiary is not essential to the efficacy of the transfer, and that acceptance of the benefit of the trust will be presumed, because of the fact that ordinarily it is advantage-

1914.]

Herrmann v. Bank.

ous to him. Thus, it has been said in the case of *Harvey v. Gardner*, 41 O. S., 642, 649:

"In general, any gift by deed, will, or otherwise, is supposed *prima facie*, unless the contrary appears, to be beneficial to the donee. Consequently the law presumes, until there is proof to the contrary, that every gift, whether in trust or not, is accepted by the person to whom it is expressed to be given."

See also *Booth v. Bank*, 122 Cal., 25; *Koch v. Streuter*, 232 Ill., 514; *Copeland v. Sommers*, 138 Ind., 219; *Sav. Inst. v. Hathorn*, 88 Me., 122; *Milholland v. Wahlen*, 89 Md., 212; *Pullis v. Iron Company*, 157 Mo., 565; *Bank v. Schwoon*, 62 N. J. Eq., 503; *Merigan v. McGonigle*, 205 Pa. St., 321; *Bank v. Albee*, 64 Vt., 571; *Thornton on Gifts*, Sections 329, 341; 39 Cyc., 70.

There is a large class of cases which have to do with gifts of bank deposits. Where a donor deposits money in the name of the donee, and delivers to him or to a third person for him, a pass-book therefor, it is manifestly his intention to pass the legal title and control of the fund, and the gift is as complete as it would be if the money were manually transferred to the donee himself (*Russell v. Langford*, 135 Cal., 356; *Appeal of Buckingham*, 60 Conn., 143; *Telford v. Patton*, 144 Ill., 611; *Savings Inst. v. Titcomb*, 96 Me., 62; *Mulfinger v. Mulfinger*, 144 Md., 463; *Davis v. Ney*, 125 Mass., 590; *In re Crawford*, 113 N. Y., 560). But frequently the intention is not so apparent, and it is then necessary to examine the circumstances very carefully in order to ascertain, if possible, the purpose of the donor.

In the case at bar, plaintiff was, because of his physical afflictions, dependent upon Mrs. Boone. He lived with and was supported by her. She evidently realized that if anything were to happen to her, he would necessarily become a charge upon others, and so she determined to make some provision for him. There can be no doubt that she desired him to benefit by these deposits and that they were set apart for that purpose. The form in which they were made indicates this, as does the fact that she had several bank accounts in her own name in which she might have deposited this money, if she had been content that plaintiff should wait until her death to receive what she might leave him

by will. The only doubt arises out of the fact that she retained control over the fund by keeping it in such form as to make it impossible for anyone except herself to draw the money and then placing the book in her own safety deposit box. It seems but natural, however, for her to arrange that only she might draw the money, for she knew that her brother was unable at all times to look after his own affairs. Moreover, she continued to make deposits in the same account, for which purpose it was necessary that she retain the book. Then, too, she may have desired to resume possession of the funds if he himself were to die (*In re Duffy*, 111 N. Y. Supp., 77) and the retention of the bank book was not in any event conclusive, even if she may be said to have retained it when she placed it in the box to which he had access as her deputy. *Booth v. Bank*, 122 Cal., 25; *Appeal of Main*, 73 Conn., 638; *Goelz v. Bank*, 31 Ind. App., 67; *Blaisdell v. Locke*, 52 N. H., 238; *Dunn v. Houghton* (N. J. Eq.), 51 Atl., 71; *Willis v. Smyth*, 91 N. Y., 297; *Atkinson's Petition*, 16 R. I., 413.

After much deliberation, we have reached the conclusion that that even if the testimony does not show clearly and unequivocally that the transfer was effective as a gift *inter vivos*, it was nevertheless effective as a voluntary and irrevocable trust created by Mrs. Boone for the use and benefit of plaintiff. The distinction between such gift and trust may be said to be of a purely technical nature. In the case of a gift, the legal title passes to and vests in the donee; while in a trust, the equitable title vests in the *cestui que trust*, while the naked legal title carrying with it the control of the property, rests in the trustee (*Savings Inst. v. Hathorn*, *supra*). But thought the distinction is technical, it is nevertheless recognized by our Supreme Court in the case of *Flanders v. Blandy*, *supra*, the court quoting (at pages 114-115) with approval from the opinion of the Court of Errors and Appeals of New York in the case of *Young v. Young*, 80 N. Y., 430, as follows:

"The transaction is sought to be sustained in two aspects, first, as an actual executed gift, and secondly, as a declaration of trust. These positions are antagonistic to each other, for if a trust was created, the possession of the bonds and the legal title thereto remained in the trustee. In that case there was

1914.]

Herrmann v. Bank.

no delivery to the donee, and consequently no valid executed gift, while if there was a valid gift, the possession and legal title must have been transferred to the donee, and no trust was created."

The word "for" upon the deposit book and card is, in our opinion, equivalent to "trustee for." It unquestionably indicates a fiduciary relationship between the parties or a representation of one by the other. It also indicates beyond a doubt that Mrs. Boone intended, by making the deposit, to renounce her previous unqualified ownership of the money, and to retain the control in a purely representative capacity only. Thus, in the case of *Barker v. Harbeck*, 49 Hun., 609, it is said:

"A deposit of money in the bank for Henrietta Barker is either a deposit of money belonging to her, or a completed gift to her, and the depositor on drawing out the money holds it as her trustee."

In the case of *Smith v. Lee*, 2 N. Y. Sup. Court Rep., 591, it appeared that D. P. Smith deposited money in bank in the name of "D. P. Smith for Charles F. Smith." The court held that the former became a trustee for the latter, and that after the death of the former a complaint in an action in equity by the latter to obtain possession of the fund was not demurrable. See also *Fowler v. Bank*, 113 N. Y., 450, 452; *Donovan v. Welch*, 11 N. D., 113. This view is in accordance with the equitable principle that no particular form of words is necessary to create a trust.

"It is not essential that a trust should be labelled a trust to make it such legally. The absence of that term is only a circumstance, and often one of every little value and influence. There is no stereotyped collection of words for the edification of a trust. In equity there is no idolatry of words. Rights are the principals, remedies the accessories; the democracy of substance is preferred to the tyranny of form; the thing stated is more important than the statement of the thing." *Trust Co. v. Bank*, 1 N. P., 169, 171.

The law relating to so-called savings bank trusts is thus stated by Prof. Irvine, 39 Cyc., 68-70:

"The deposit of money in a bank by one person in trust for another raises a presumption that a trust was intended, and when supported by evidence showing the same intent or when not rebutted by evidence showing a contrary intent, creates a trust, which, according to most authorities, is complete and irrevocable, but which according to other authorities, is, in the absence of circumstances showing an intent to make it revocable, tentative and revocable during the life of the depositor, becoming absolute on his death without revocation and entitling the beneficiary to the balance remaining at the time of the depositor's death, but not to anything more than such balance. * * * Although these facts are sometimes construed, in connection with other facts, to show an intention not to create a trust, the retention of the bank book by the depositor, or the making of subsequent deposits and withdrawals, do not of themselves destroy the character of a trust of this nature, when it is once created and established, as it is consistent with the trust that these acts be done by the depositor as trustee."

In *Perry on Trusts*, Volume 1, Section 82, the rule is thus expressed:

"In case of a deposit in bank in trust for another, there must be an intent to pass the beneficiary interest during the life of the donor, and not merely a testamentary intent that the person named as *cestui* shall have the money at the decease of donor who retains complete control of the fund during his life. The general rule is that a deposit of money in the name of the depositor, in trust for another, transfers the title to the latter."

An examination of a few cases upon this subject will shed light upon the case at bar. In *Martin v. Funk*, *supra* (which is approved by our Supreme Court in *Worthington v. Redkey*, *supra*), the following facts appear: A deposit was made in the savings bank, the depositor declaring at the time that she wanted the account to be in trust for a certain person. The pass-book which the depositor retained, stated that the account was in trust for such person. The money remained in the bank until the depositor's death, except that one year's interest was withdrawn. The *cestui que trust* was ignorant of the trust until after the depositor's death. In an action by the beneficiary to recover possession of the pass-book and to recover the deposits, the court held that the transaction was a valid and sufficient dec-

1914.]

Herrmann v. Bank.

laration of trust and passed the title to the deposits, and that a retention of the pass-book was not inconsistent with the completeness of the gift and that notice to the *cestui que trust* was not necessary. In *Savings Inst. v. Hathorn, supra*, it appears that the depositor retained the bank book until his death, and that he never communicated to the *cestui* his intention as to the deposit. The court held that the words "in trust for" in the entry of a savings bank deposit, with the same form used in the depositor's book, is sufficient to create a *prima facie* trust in favor of the donee where all the donor's declarations and acts are consistent with the presumption arising from the entry itself. The court said:

"It is not necessary, therefore, that he who declares a trust should divest himself of the legal title, if perchance he so does it as to transfer the real or equitable title to the *cestui*. * *

* He may retain the legal title giving him control, but for the benefit of the *cestui*, according to the terms of the trust."

In *Sayre v. Weil*, 94 Ala., 466, it was held that a trust is complete and irrevocable when a person makes a deposit of money to the credit of himself as trustee for certain children named, and nothing remains in him but the mere naked legal title.

In *Gaffney's Estate*, 146 Pa., 49, it was held that a *prima facie* trust was established in favor of the beneficiary, although he never had possession of the bank book, where one deposited money to the credit of himself as trustee, and the money remained until his death.

In *Blaisdell v. Locke, supra*, it appears that a deposit was made in a savings bank in the name of one who was the niece of the depositor, the latter intending that it should be a gift, but retaining the bank book until her death. In an action by the beneficiary against the bank to recover the deposit, it was held that although there was no complete gift *inter vivos*, yet the deposit created a trust in favor of the niece and her acceptance of it rendered her title absolute although there was no delivery of the bank book.

In *Robertson v. McCarty*, 54 App. Div., 103, it was held that a deposit by one in trust for another created an irrevocable trust

in the entire deposit, although the depositor retained possession of the bank book, and the beneficiary did not know of the trust until the donor's death.

In *Jenkins v. Baker*, 77 App. Div., 509, it appears that a woman opened a savings bank account in her own name in trust for her husband and deposited therein sums which, with interest, aggregated approximately \$1,400. About six months later she drew out all of such sums and gave \$650 thereof to her daughter. She died shortly thereafter, without disclosing to her husband the existence of the account and without making any declaration in respect thereto. It was held that, in the absence of testimony showing a contrary intention, the opening of the account in trust furnished sufficient proof that the woman intended to create a trust in favor of her husband and that the withdrawal of the money from the account before her death did not rebut the inference to be drawn from the opening of the account. The court quotes with approval the language of court of appeals in *Cunningham v. Davenport*, 77 N. Y., 43:

"The doctrine laid down by this court in previous cases amounts to this: That the act of a depositor in opening an account in a savings bank in trust for a third party, the depositor retaining the possession of the bank book, and failing to notify the beneficiary, creates a trust, *if the depositor dies before the beneficiary leaving the trust account open and unexplained*. If the intent can be strengthened by acts and declarations of the depositor during his lifetime amounting to a publication of his intention, a more satisfactory case is made out, but it is not absolutely essential, in the absence of explanation, where he dies leaving the trust account existing."

In the case of *Harris Banking Company v. Miller*, *supra*, it appears that decedent deposited a fund in bank, and upon advice as to the method of transferring the fund to the *cestui que trust*, took back a certificate of trust and endorsed it to the *cestui*, then notifying the bank and the *cestui* that the certificate was held by the depositor for the latter, who retained the right to use the income during his lifetime. It was held that although a perfect gift *inter vivos* was not shown, there was evidence sufficient to sustain the contention that a valid trust

1914.]

Herrmann v. Bank.

in favor of claimant was created and the fund was accordingly awarded to him. The court says:

"It does not follow that because a party is not able to establish a perfect gift *inter vivos*, he or she may not show a perfect, valid trust and have it enforced. The decision in Souldard's case (141 Mo., 642), is a complete refutation of such position. In that case it was ruled that there was no valid gift and yet it was held that a valid expressed trust had been created, and it was enforced."

The fact that there was no written declaration in the case at bar does not affect our views. In *Perry on Trusts*, Section 86, it is said:

"There does not seem to be any objection, however, to the establishment of a trust in personal property by parol. The owner, in the absence of a statute, has entire control of it. He can sell and transfer it without writing and by parol, and if he can transfer it by parol, there is no reason why he may not, by parol transfer it upon such lawful terms, and to such uses and trusts as he may desire. * * * When a person *sui juris*, orally or in writing, explicitly or implicitly, declares that he holds personal property for another, he thereby constitutes himself an express trustee."

In *Savings Inst. v. Titcomb*, 96 Me., 61, it is said:

"The creation of a trust is but a gift of an equitable interest. An unequivocal declaration as effectually passes the equitable title to the *cestui que trust* as delivery does the legal title to the donee of a gift *inter vivos*. One may constitute himself trustee by a mere declaration."

In *Gerrish v. Inst. for Savings*, 128 Mass., 159, it is said:

"There is in the case at bar no formal written declaration. But no particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another. It is enough for the latter purpose that it be unequivocally declared in writing or orally, if the property be personal, that it is held in trust for the purpose named."

And to the same effect, see *In re Souldard*, 141 Mo., 662; *Pomeroy's Eq. Jur.*, Section 1008; *Ames on Trusts*, 47, 186.

Counsel for defendants cite several Ohio cases, upon which the following comments may be made:

Estate of Galbraith, 4 O. L. R., 186: The testimony in this case conclusively showed that decedent did not intend to part with the dominion and control over the bonds which were the subject of the controversy. The alleged donee testified that decedent had asked her if she would return the bonds if required to do so, and that she replied in the affirmative. The court properly held that the bonds must be listed as part of the estate of the decedent.

Hamor v. Moore's Admrs., 8 O. S., 239: This was an action in *assumpsit* upon a written promise in which the intestate directed his executors to pay a specified amount to plaintiff or to her sons, after his decease. The court held that it was not intended as a gift *inter vivos* and that it was not complete as a gift *causa mortis*. It is apparent that no delivery of the amount set out was ever intended by decedent to take place during his lifetime, and the case can not shed any light upon the case at bar.

Gano v. Fisk, 43 O. S., 462: This case deals entirely with gifts *causa mortis* and decides that direction by an intestate to divide a certain property after his death is not sufficient to constitute such gift.

Starr v. Starr, 9 O. S., 75; *Simmons v. Sav. Society*, 31 O. S., 457, and *Johnson v. Otterbein*, 41 O. S., 527, are cases dealing with mere promises, without consideration, which are manifestly revocable at any time by the promisor.

We are of the opinion that the fund in this case should be awarded to plaintiff, and a decree may be entered to that effect.

1914.]

Andrews v. State.

**AS TO CONFORMITY TO THE STATUTE REGULATING
ASSIGNMENT OF WAGES.**

Common Pleas Court of Franklin County.

P. L. ANDREWS V. STATE OF OHIO.

Decided, January, 1914.

*Salary and Wages—Assignments of—Amount Due Must be Shown in
Figures—Section 6346-4.*

It is a violation of the statute relating to the assignment of wages to fail to fill in the blank form provided by statute, in figures, the amount due from the assignor under the assignment.

EVANS, J.

Heard on petition in error to the Police Court of Columbus.

Several grounds of error are relied on.

The gist of the charge in the affidavit is: that defendant below, then engaged in the business of purchasing and making loans upon salaries and wage earnings in accordance with the law of Ohio, * * * did unlawfully retain a certain assignment of salary and wages from one Calvin Dixon, upon a printed form in which there were blank spaces; and did improperly and unlawfully fill a certain blank space therein by writing the word "all" before the word "dollars" "for services rendered and to be rendered by me within three years from date hereof," instead of and in lieu of "\$36.15 for services rendered and to be rendered," the same being the proper and true amount the payment of which said assignment was intended to cover and secure.

The statute under which this prosecution is had, Section 6346-4, and the penal statute, Section 6346-6, General Code, provide:

Section 6346-4: "No person * * * so licensed shall receive any assignment of salary or wages signed in blank, but all blank spaces shall be filled in with ink or typewritten with the proper names and figures, showing the name of the firm, person or corporation by whom the person making the conveyance or assignment is employed," etc.

Section 6346-5 limits the rate of interest to eight per cent. per annum upon the principal sum. In addition, a reasonable charge may be made for investigation, examination, collection and all

other charges, not to exceed ten per cent. upon the principal sum, and any contract, conveyance, or assignment for the purchase or assignment of any salary or wage earnings and any loan upon chattels or personal property whatever shall be void," * * * which provides for or contemplates the payment of any amount or sum in excess of the rates or charges herein provided for, etc. Section 6346-6 relates to the penalties.

The principal questions presented by the record are, whether the affidavit charges an offense in violation of said act, and whether there was error in overruling the demurrer thereto, and in the judgment of conviction and sentence of defendant below on the trial.

That is the intended meaning of the language of the statute, Section 6346-4, to-wit: No person * * * so licensed, shall receive any assignment of salary or wages signed in blank, but all blank spaces shall be filled in with ink or typewritten with the proper names and figures, etc.

In the assignment in question, instead of writing in words or figures the amount of dollars to be assigned for services and to be rendered, it was written therein, "I hereby assign my claim against * * * to the amount of all dollars for services rendered and to be rendered by me within three years from date hereof, and authorize the amount due and to become due to me from said company to be paid P. L. Andrews, his order or assigns."

A determination of the question depends upon a construction of said act.

There have been no adjudicated cases construing the act in said respect.

It is claimed by plaintiff in error that inasmuch as all the blanks were filled before signing, that the assignment was only collateral to secure the payment of the loan of \$35; and that Dixon, the assignor, had authority of law to assign whatever property he had or would come to him, including wages or earnings; that therefore it was no violation of this act to so fill said blank without designating in amount in dollars the wages or earnings assigned.

This act, like many others, is grounded upon public policy. Its scope is intended to protect persons working for hire or wages

1914.]

Andrews v. State.

against unreasonable exactions by persons, so employed, in loaning money, and in receiving assignments of wages or earnings; and also, in protecting the families of wage earners against such unreasonable exactions, and thereby impairing and reducing means of livelihood. This is evident from the fact that the statute provides that the assignment shall contain the name of the husband or wife.

The statute also provides Section 6346-5 “* * * any assignment of any salary or wage earnings and any loan * * * shall be void,” which provides for or contemplates the payment of any amount or sum in excess of the rates or charges herein provided for.

In my opinion it would make no difference whether the assignment of wages was absolute or whether it was made as collateral security for the loan; for if the latter, it could not contemplate an amount in excess of the rates and charges provided by the statute.

The best means of determining whether the assignment is so in excess or not would be determined from the amount stated in the assignment itself.

The loan was for an agreed specified amount, the rate of interest and the rate for extra charges are definitely fixed by statute; the time the loan runs, its maturity, is fixed by the contract. When due it must be paid, or may be renewed. If not paid or renewed the wages or earnings so assigned are payable to the lender.

I am unable to see wherein the lender stands to lose for his loan upon an assignment of wages specifically stating the amount thereof, upon a properly executed system under the provision of said act.

Section 4 of said act is plain, and I see no reason why it should not be complied with in all such transactions. It is intended that such blanks shall be filled with the proper amount, and a person licensed in such business violates the statute by so neglecting or avoiding the provisions.

I have examined all grounds of error relied on, and am of the opinion that there is no material error in the record.

Judgment below is affirmed at cost of plaintiff in error.

ACTION TO QUIET TITLE AGAINST BILL-BOARD RIGHTS.

Superior Court of Cincinnati.

WILLIAM A. WINDISCH v. JOHN CHAPMAN CO.

Decided, May 15, 1913.

Vendor's Lien—Can Not be Based on a Reserved Right to Maintain Bill-boards—Vendor and Purchaser—Lien Can Not be Based on Covenants or Agreements.

A vendor's lien on real estate is limited to unpaid purchase money, and can not be based on the reservation of a privilege or license, such as the right of the grantor to erect and maintain on the premises conveyed bill-boards and signs free of rental therefor.

Clement Bates and F. P. Muhlhauser, for plaintiff.

A. B. Chambers and T. L. Michie, contra.

OPPENHEIMER, J.

Plaintiff filed his petition against the defendant in which he alleges that he is the owner in fee of certain real estate described in the petition: that said real estate came to him through mesne conveyance from defendant and that owing to a formal defect in the original deed from defendant to its immediate grantee, a cloud has been cast upon his title. He therefore asks to have his title quieted against defendant.

The defendant, in its answer, alleges that on January 7, 1904, it conveyed the property described in the petition to one Charlotte Lindner, the consideration for the transfer being \$2,000 "and the exclusive right to erect and maintain, without rental, bill-board signs on any portion of the property * * * as long as the purchaser possesses" it; that for the purpose of defeating this reserved right a fictitious sale was made to one Clara W. Dorger, who thereupon leased it to the Maley, Thompson & Moffet Company; that the latter company thereupon proceeded to remove the bill-boards, and that despite an injunction suit instituted by defendant, the boards were ultimately removed because defendant was unable at that time to show that the deed to Clara W. Dorger was not a *bona fide* one; that

1914.]

Windisch v. Chapman Co.

the property was subsequently reconveyed to Clara W. Dorger, by whom it was, on September 27, 1911, deeded to Clement Bates, who is plaintiff's immediate grantor. Defendant further alleges that the conveyances made prior to the acquisition of the title by Clement Bates were all fraudulent and made for the express purpose of defeating its reserved right, and that by reason thereof it has suffered damage to the extent of \$3,500. For this sum it prays judgment and it asks also that the judgment may be declared a lien upon the property in the hands of the plaintiff.

This defense is manifestly a decidedly novel one, and its novelty has induced us to hesitate. Defendant argued at first that the privilege of maintaining signboards was a covenant which ran with the land. Finding this position entirely untenable, it now contends that the privilege was expressly made part of the consideration for the transfer; that it is therefore part of the purchase price, and that as it was not paid (*sic!*) it is a lien upon the property. And to sustain their contention counsel quote from Anderson's Law Dictionary:

"A vendor's lien upon land holds for any part of the purchase money which remains unpaid, against all persons except a purchaser for a valuable consideration without notice."

As it is not alleged that either plaintiff or his immediate grantor was not a purchaser for value without notice, that this portion of the "consideration" had not been "paid," we fail to appreciate the helpfulness of the quotation: but as such answer may be too patent to overcome such an ingenious argument, we point out the less obvious fact that the definition comprehends only money, and surely a privilege is not money, although it may be pecuniarily valued. Every case cited in defendant's brief, except *Amos v. Railway*, 17 C. C. 684, relates specifically to purchase money, and that case relates to an agreement to pay in stock, which thus became by consent a medium of exchange.

A vendor's lien is an equitable right accorded by implication to one who has conveyed land without reserving a lien thereupon to subject the land to the payment of the purchase

price when the rights of others will not be injuriously affected thereby. It concerns itself invariably with purchase money or its equivalent, and we find absolutely no case which creates a lien of this kind for the protection and enforcement of a privilege or license. *Gee v. McMillan*, 14 Ore., 268 (12 Pac. Rep., 417; 58 Am. Rep., 315); *Blomstrom v. Dux*, 175 Ill., 435 (51 N. E. Rep., 755); *Eubank v. Finnell*, 118 Mo. App., 535 (94 S. W. Rep., 591); *Wilson v. Mining Co.*, 174 Fed. Rep., 317.

The lien originates in the doctrine of equitable trusts, is entirely a creature of equity, having no authority in positive law, and was doubtless devised to contravene the rule of common law that land might not be subjected to execution for a simple contract debt. *Mutual Aid Bldg. Assn. v. Gashe*, 56 Ohio St., 273; *Campbell v. Sidwell*, 61 Ohio St., 179; *Ahrend v. Odiorne*, 118 Mass., 261 (19 Am. Rep., 449). It is not an interest or estate in the land, but a mere equitable right to resort to the land in case the purchase money is not paid and in case there be no intervening rights which would render its enforcement unconscionable.

In order to give the vendor a lien, there must be a debt for unpaid purchase money to a fixed amount (*Welsh v. Loan & Tr. Co.*, 165 Fed. Rep., 561). The debt must be payable at a certain time and in a certain manner (*Donovan v. Donavan*, 85 Mich., 63). It must be payable as purchase money (*Shaw v. Tabor*, 146 Mich., 544). The consideration may be paid otherwise than in money, as in goods or services (*Amos v. Railway, supra*; *Ross v. Clark*, 225 Ill., 226). But it can not consist of covenants or agreements for the breach of which the remedy is an action at law for damages. *Graham v. Moffett*, 119 Mich., 303; *Whitely v. Trust Co.*, 76 Fed. Rep., 74.

It follows necessarily that defendant can acquire no lien upon these premises, and the motion for judgment on the pleadings will be granted.

1914.]

Bank v. Hunt et al.

**LIEN OF STATE BANKS UPON STOCK OWNED BY DEBTORS
TO THE BANK.**

Common Pleas Court of Hamilton County.

**THE FIRST NATIONAL BANK OF NORWOOD V. WILLIAM WELLING
HUNT AND THE MADISONVILLE DEPOSIT BANK.**

Decided, 1914.

Banks and Banking—Lien of a Bank Upon Stock Owned by One Indebted to it—Reason for a Statutory Provision Creating Such a Lien—Restraints Upon Directors and Stockholders—Section 9683.

1. A bank organized under the laws of Ohio, and incorporated under the act of March 21st, 1851, known as the "free banking act," has a lien upon the shares of stock of its stockholders, issued and outstanding, for any indebtedness due from such stockholder to such bank, by virtue of Section 9683 of the General Code of Ohio, and this lien is superior to the lien of another creditor, although created more than two years prior to such stockholder becoming indebted to such bank.
2. There can be no lien in favor of a bank incorporated under the act of March 21st, 1851, upon any stock issued after June 7th, 1911, by virtue of Section 8673-15 of the General Code of Ohio, unless the right of such lien be stated upon the certificate of stock.

William R. Collins, for the plaintiff.*Healy, Ferris & McAvoy*, for Wm. W. Hunt.*Gideon C. Wilson and Stephen W. Jones*, for the bank.**GEOGHEGAN, J.**

On January 8, 1908, the Madisonville Deposit Bank, a corporation formed under the act of March 21, 1851, known as "an act to authorize free banking" (49 Ohio Laws, 41), issued its certificate No. 82, for twenty shares of its capital stock, to Howard M. Hunt. On January 28, 1908, the said Howard M. Hunt executed his promissory note for \$900 to the First National Bank of Norwood, Ohio, a national bank organized under the laws of the United States, and deposited said twenty shares as collateral security for the loan. This note was removed from time to time

and the indebtedness was finally assumed by William Welling Hunt, defendant herein, by the giving of his certain promissory note to the First National Bank of Norwood, Ohio, on November 18, 1912, in the amount of \$850, which was the balance then due on said original note, and the said William Welling Hunt deposited as collateral security the said twenty shares of the Madisonville Deposit Bank stock. His authority to do this was evidenced by two papers, one under date of November 25, 1908, addressed to W. W. Hunt, and signed H. M. Hunt, wherein the said W. W. Hunt was authorized to use said certificate No. 82 as collateral security with the First National Bank of Norwood, Ohio, for any loan or renewal thereof that the said W. W. Hunt desired to make with said bank, and a second under date of November 20, 1912, addressed to the First National Bank of Norwood, Ohio, and signed by H. M. Hunt, as follows:

"Gentlemen: This is your authority for the transfer to the name of W. W. Hunt, the certificate of stock known as certificate No. 82 for 20 shrs. of the Madisonville Deposit Bank, Madisonville, O., issued in the name of H. M. Hunt and properly endorsed by him, and now held by you as collateral security for a loan of W. W. Hunt."

The note of November 18, 1912, signed by W. W. Hunt, becoming due and not being paid, the First National Bank of Norwood, Ohio, in accordance with an option contained in the collateral agreement, whereby the aforesaid twenty shares of stock were pledged, proceeded to sell stock through the agents of a broker of the city of Cincinnati, upon the stock exchange of said city. Said stock was sold and when the certificate was then presented for the first time for transfer upon the books of the Madisonville Deposit Bank, the Madisonville Deposit Bank refused to transfer it, claiming a lien by virtue of Section 3821-70, Revised Statutes of Ohio, now Section 9683 of the General Code of Ohio, which section was the original Section 11 of the act of March 21, 1851, referred to above.

This lien was claimed by reason of a certain indebtedness of the said Howard M. Hunt to the Madisonville Deposit Bank, as evidenced by his promissory note of February 17, 1911, in the

1914.]

Bank v. Hunt et al.

sum of \$879.60, payable to the said Madisonville Deposit Bank.

There is no evidence sufficient to justify any assumption that the said Madisonville Deposit Bank had any knowledge of the use that had been made of said stock with reference to the transactions of said Howard M. Hunt and W. W. Hunt with the First National Bank of Norwood, Ohio, and, therefore, the primary right which the plaintiff herein seeks to have enforced in this action, to-wit, a mandatory injunction requiring the said Madisonville Deposit Bank to transfer the stock on its books to the purchaser at the sale of said stock upon the Cincinnati Stock Exchange, depends upon whether or not Section 11 of the act of March 21, 1851, creates a lien upon this stock in favor of the Madisonville Deposit Bank; and further, if the first question is decided in favor of the Madisonville Deposit Bank, whether or not said Section 11 of said act is in conflict with the provisions of Article II, Section 28, of the Ohio Constitution, and Article I, Section 10, of the Constitution of the United States, in that it impairs the obligation of the contract between the plaintiff and the defendant, W. W. Hunt, as evidenced by the giving of the note and the collateral agreement.

As to the first proposition, there seems to be little difficulty in view of the history of that legislation originally known as "the free banking act." The original Section 11 of the act of March 21, 1851, 49 Ohio Laws, page 41, provides as follows:

"The capital stock of every company shall be divided into shares of fifty dollars each, which shall be deemed personal property, and shall only be assignable on the books of the company, in such a manner as its by-laws shall prescribe; each bank shall have a lien upon all stock owned by its debtors and no stock shall be transferred without the consent of a majority of the directors, while the holder thereof is indebted to the company."

This particular Section 11 of the act was carried into the Revised Statutes in identically the same language, as Section 3821-70, and said section was carried into the General Code as Section 9683, and as such it is now the law of Ohio and prescribes a limitation upon the transfer of stock in a banking company organized under the free banking act.

The Madisonville Deposit Bank was incorporated under said act on the 10th of January, 1907, and has been carrying on its business as such bank since that time.

Counsel for the plaintiff refer to Section 15 of the act of June 7, 1911, entitled "an act to make uniform the law of transfer of shares of stock in corporations" (102 Ohio Laws, 500), which Section 15 is now known as Section 8673-15 of the General Code, and which provides that:

"There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation and there shall be no restriction upon the transfer of shares so represented by virtue of any by-laws of such corporation, or otherwise, unless the right of the corporation to such lien, or the restriction is stated upon the certificate."

The defendant contends that inasmuch as the certificate herein did not contain upon its face the restriction set forth in Section 9683, to-wit, that each bank shall have a lien upon all stock owned by its debtors and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is indebted to the company, the Madisonville Deposit Bank can not now claim said lien and refuse to transfer the stock on its books to the purchaser at said sale.

However, in setting this up he overlooked Section 23 of the act of June 7, 1911, which expressly limits the application of the provisions of the act to certificates issued after the taking effect of the act, which was fixed at July 1, 1911.

This stock having been issued January 8, 1908, is not subject, therefore, to the provisions of Section 8673-15.

Therefore, it would seem that at the time this stock was deposited with the First National Bank of Norwood, Ohio, by the said Howard M. Hunt, the said bank took said stock with notice of the fact that there would be a lien thereon in favor of the Madisonville Deposit Bank for any indebtedness to said bank by Howard M. Hunt. Persons obtaining stock issued by banks incorporated under the free banking act are bound to take notice of the lien reserved by Section 9683, General Code, under the familiar principle that all persons are presumed to act with

1914.]

Bank v. Hunt et al

knowledge of the general laws of the land, unless this section has been repealed by implication by Section 8673-15, General Code, a question which can have no effect upon the conclusion to be had herein.

As to the second proposition, that the said act is in contravention of the provisions of Article II, Section 28, Ohio Constitution, and Article I, Section 10, of the Constitution of the United States, inasmuch as it impairs the obligation and freedom of the contract, no authority is cited by counsel in support of this proposition, with the possible exception of *Palmer & Crawford v. Tingle*, 55 Ohio State, 423, wherein the mechanic's lien law of April 13, 1894 (91 Ohio Laws, 135, was declared unconstitutional upon the ground that it gave sub-contractors, etc., a lien on the property of the owner without requiring a notice on the part of such sub-contractors, etc., to the owner before he has paid to the head contractor the amount due him upon the contract as is now required. However, an examination of the opinion of the court throws considerable light upon the underlying principles which impelled the court to declare that law unconstitutional. On page 441 the court uses this language:

"The word 'liberty,' as used in the first section of the Bill of Rights does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. *People v. Marks*, 99 N. Y., 377; 52 Am. R., 34; *Bertholf v. O'Reilly*, 74 N. Y., 15; 30 Am. R., 323; *Matter of Jacobs*, 98 N. Y., 98; 50 Am. R., 636.

"Contracts and compacts have been entered into between men, tribes and nations during all time from the earliest dawn of history, and the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our Constitution, and it may be restrained only in so far as it is necessary for the common welfare, and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common public welfare, and equal protection and benefit of the people must appear, not only to the General Assembly, by force of popular clamor, or the pressure of the lobby, but also to the courts, and it must be so clear, that a court of justice in the calm deliberation of its judgment, may

be able to see that such restraint is for the common welfare and equal protection and benefit of the people. *People v. Gillison*, 109 N. Y., 389; 4 Am. St. Rep., 465."

Then the court points out various statutes which impose restraints upon the liberty to contract, such as statutes against usury, statutes giving exemptions, and points out that such limitations are for the general welfare of the whole people and do not interfere with their equal protection and benefit.

Now in this case the object of this statute is plain to the court. It is designed to protect depositors in banks from the consequences of improvident or dishonest loans to irresponsible stockholders. The state has given to a bank of this character its sanction and stamp of approval and by enacting stringent laws whereby the daily operations of the bank are inspected and governed, it has in a great measure tended to inspire confidence on the part of the public in the bank, and therefore it seems wise and proper that it should exact more security from a shareholder than of any other persons, especially in view of the well known fact that the shareholder is more familiar with the operations of the bank and has more means of securing money from the bank on his individual obligation than persons who are not so situated.

A provision similar to the one in question was discussed by Judge Thurman, in the case of *Conant et al v. Bank et al*, 1 Ohio State, 298, wherein, at page 304, he said:

"The intent of the act is to give the bank a double security where a stockholder is the debtor; first, the same security that persons not stockholders are required to give; secondly, a lien upon his stock. These are wise provisions, tending to protect the bank and the public against the consequences of improvident or dishonest loans to irresponsible stockholders. It is judicious and right to require more security of a shareholder than of another person; and giving a lien on his stock is only carrying out the principle that obtains in ordinary partnerships, that the interest of the partner is what remains after deducting his debts to the firm."

The act he was discussing was the "act to incorporate the State Bank of Ohio and other banking companies" (43 Ohio

1914.]

Bank v. Hunt et al.

Laws, 24), wherein precisely the same lien as herein was granted.

And in *Downer's Admr. v. Bank*, Wright, 477, the Supreme Court, in discussing the provisions of the act creating the Zanesville Bank (30 Ohio Laws, 99), wherein a similar provision as the one in question was involved, says:

"Such lien is paramount for the public security, and should not be relinquished, without payment or other security."

And in *Bellevue Bank v. Higbee*, 4 C. C., 222, the court discusses Section 9 of the act "to incorporate savings and loan associations (70 Ohio Laws, p. 40), and holds that under that act a board of directors have authority to make a by-law to the effect that no stockholder has the right to transfer stock without the consent of a majority of the board of directors until the indebtedness of the stockholder to the bank has been paid.

The principle herein involved, that is, the right to create a statutory lien of this kind, is recognized in *Stafford v. Banking Co.*, 61 Ohio State, 160, at 168.

Section 11 and 12 of the Free Banking Act were before the court in the case of *Franklin Bank v. Commercial Bank*, 36 Ohio State, 350, and while the provisions of Section 11 are not discussed in the opinion of the court, in no place is the constitutionality of Section 11 questioned or challenged.

In view of these authorities and the fact that the Legislature has in other and similar acts, both special and general, reserved the lien herein sought to be enforced by the Madisonville Deposit Bank upon shares of stock in the hands of stockholders who were indebted to the bank, it seems to me that it is a rather late day to question the constitutionality of this provision.

It is my opinion that provisions of this kind are wise and salutary; that they are designed for the purpose of restraining directors and stockholders in the bank from unwisely, improvidently or fraudulently making loans of the depositors' money to themselves and that whatever limitations may be placed upon the free disposition of stock issued by banks incorporated under this act in the hands of stockholders, they are completely overbalanced by the general good that is subserved by such restrictive provisions.

The mandatory injunction will be refused and the second and third causes of action in plaintiff's petition will be dismissed. As to the first cause of action, judgment may be had upon the note of W. W. Hunt, in favor of the First National Bank of Norwood, Ohio. Judgment will also be rendered in favor of the Madisonville Deposit Bank against Howard M. Hunt, for his indebtedness to said bank. The lien of the Madisonville Deposit Bank upon the said twenty shares of stock will be enforced, and such other orders will be made as are necessary to carry into effect the rights of the Madisonville Deposit Bank as against this stock, and all further orders as are necessary to protect the various rights of the parties hereto as they may exist in the light of the foregoing opinion.

PROCEDURE FOR MODIFICATION OF A DECREE FOR ALIMONY.

Common Pleas Court of Cuyahoga County.

BELLE CONANT v. MERTON CONANT.

Decided, May 18, 1914.

Alimony—Grounds Upon Which a Modification May be Secured of Decree Fixing Allowance—Method of Procedure—What Constitutes Changed Conditions.

1. The proper procedure where it is sought to have a decree for alimony modified is by filing a petition asking for a modification for reasons which have arisen since the rendition of the original decree. (*Chas. J. ...*)
2. The change in the circumstances of the petitioner, which will warrant a modification of the original decree, must be of so material a character as to make necessary a modification of the original decree to suit the altered condition of the parties. (*Chas. J. ...*)
3. The loss by the wife of the aid of her son because of his prospective marriage does not constitute a change of circumstances warranting a modification of the decree, since it must be presumed that the court in granting the decree had in mind the probability that the young man would marry in due time.

1914.]

Conant v. Conant.

*Walter C. Ong, for plaintiff.**David E. Green, contra.*

FORAN, J.

On the 24th of September, 1912, Belle Conant, the plaintiff herein, was awarded a judgment or decree for divorce from the defendant, Merton Conant, on the ground of gross neglect of duty. She was also awarded the custody of two minor children, Howard Conant, then about eighteen years of age, and Roger Conant, then about eleven years of age. The following is the entry that appears upon the court's trial calendar:

"To court. Decree for plaintiff, gross neglect of duty. Awarded custody of minor children, subject to right of defendant to visit, etc. Plaintiff awarded \$500 alimony, \$50 to be paid in fifteen days, \$50 in thirty days, balance payable \$5 a week, beginning September 15, 1912. Defendant to pay \$1,200 for support of minor child, Roger, \$5 a week until paid. O. S. J."

Counsel for plaintiff, in preparing the journal entry, with respect to the order for alimony, used this language:

"It is further ordered, adjudged and decreed by the court, that the defendant, Merton Conant, shall pay to the plaintiff, Belle Conant the sum of \$50 on or before October 5th, and \$50 on or before the 15th day of October, and \$5 per week commencing on the 15th day of September, 1912, until he shall have paid to the plaintiff, Belle Conant, the total sum of \$500. And the further order of the court is, that the defendant, Merton Conant, shall pay to the plaintiff, Belle Conant, the sum of \$5 per week for the maintenance, care and support of Roger Conant, commencing the first week of October, 1912," etc., "and so on until the defendant has paid to the plaintiff for the maintenance and support of said child the sum of \$1,200."

This decree was o.k'd. and journalized. It will be noticed that the language of the decree is infelicitous, but it is quite apparent, even from the decree as journalized, that the alimony allowed the plaintiff for herself was the lump sum of \$500, payable in installments as set forth, and that the amount allowed the plaintiff for the support of the minor child, Roger Conant,

was also a definite and specified sum, in the amount of \$1,200, payable in installments. That it was the intention of the court who heard the case and granted the decree to allow permanent alimony, in gross, to the plaintiff, for the support of herself and of said minor child, is conclusively shown by the entry made by the court upon its trial calendar.

On the 17th day of March, 1914, plaintiff filed in this court, in this case under its original number of 124270, a motion which reads as follows:

"Now comes plaintiff, Belle Conant, and moves the court for an additional order in this case for alimony, to be paid to her in such amount and for such period of time as to the court may seem reasonable and fair."

This motion is supported by an affidavit, in which it is said that at the time the divorce was granted her eldest son, Howard Conant, who was then about eighteen years of age, regularly and continually assisted and aided the plaintiff to live, keep house and keep her home. That the younger boy, Roger, is still with her and makes his home with her, but that Howard, who is now about twenty years of age, expects to be married in June, 1914, and that from that time on or from the present time he will be unable to assist her in her maintenance and support.

The affidavit contains no allegation that there was any fraud or mistake in obtaining the original judgment or decree, or that any facts bearing upon the relation of the parties, then unknown, have since been discovered. The only allegations of any changed conditions that have arisen since the entry of the judgment or decree for divorce are those relating to the fact that Howard Conant, her eldest son, expects to be married in June, 1914.

The case was fully heard, both parties being present in court at the time of the hearing, and all facts relating to the necessities of the wife, the plaintiff, and the ability of the husband, or the defendant, to pay alimony were brought to the attention of the court, and the judgment of the court was wholly and entirely based upon the evidence then before it. No appeal was

1914.]

Conant v. Conant.

taken by the plaintiff, and no objection was made by her or her counsel to the amount of alimony allowed her, or allowed her for the support of the minor child, Roger. No provision was made for the support of Howard Conant, as it appeared from the testimony at the time that he was earning money and had been practically emancipated. The plaintiff, however, was awarded the custody of Howard, so as to prevent any interference with him by the defendant.

Counsel for the defendant asks that this proceeding be dismissed, first, because it is improperly brought, being by motion and not by petition; and, second, that the affidavit attached to the motion does not state sufficient facts to justify any modification or alteration of the original decree.

We think the contention of counsel for the defendant, that this proceeding should be by petition, is well taken.

It was held in the case of *Meissner v. Meissner*, by the Lucas County Circuit Court, 5 O. C. D., 305, that:

“The proper course for a plaintiff to take who seeks to have an alimony decree modified, is to file his petition in the common pleas court, in which he asks to have the decree modified, for reasons that have arisen since the rendition of the original decree; and such party must join all the proper parties to such proceeding, and have the case heard in the common pleas court.”

Upon both theory and principle, this would seem to be the proper practice. The new facts or the new conditions must be such as could not have been pleaded in the original suit or brought to the attention of the court at the trial of the former action. They must relate to circumstances that arose after the decree or judgment was entered; and before the court will modify the decree or judgment, it must appear that a material alteration of the circumstances and conditions as they existed at the time of the former trial, has taken place. See Bish. Mar. & Div., 5th edition, Section 429. And this material alteration of circumstances must be of such a character as to make the modification necessary to meet and suit the changed and altered conditions of the parties.

In *Olney v. Watts*, 43 O. S., 499, the court say in the syllabus:

"A party to a decree for alimony may, by an original petition and suit, obtain a modification of such former decree upon proper allegations of the changed conditions and circumstances of the parties."

It may be contended, however, that the language used by the court does not exclude a party from obtaining the relief sought by motion in the original case. But it must be remembered that the right to modify a decree for permanent alimony is an exception to the general rule, and does not pertain in all jurisdictions in this country. Indeed the weight of authority seems to be, that permanent alimony will not be granted after a judgment for divorce has been rendered, unless this right is reserved in the judgment. A decree for alimony may be modified after the time within which an appeal could have been prosecuted, because of fraud or mistake, the same as any other decrees. *Senter v. Senter*, 70 Cal., 613.

The proceeding to modify a decree for alimony is in the nature of a proceeding in equity, and should be by petition, so that the issues may be properly made up. The statements or allegations upon which the party seeks for such modification of decree for alimony may be wholly insufficient to justify the court in considering the application; in other words, the petition may be demurrable; and the defendant, it seems to the court, would have the same right to move or plead to such a proceeding or suit that he would have in any other suit or proceeding; and therefore it seems to the court that the proceeding ought to be by petition. So far as the court has been able to ascertain, this has been the practice in Ohio. It is also the practice in Indiana. See 3 Ind., 305. It seems to be also the practice in Michigan. See *Perkins v. Perkins*, 12 Mich., 456. Even in the case of *Crugom v. Crugom*, 64 Wis., 253, a case cited by counsel for the plaintiff, the proceeding was by petition, praying that the judgment be modified or amended so as to provide for suitable alimony to the defendant.

“An *original* bill may be maintained to set aside the decree on proper cause.” 1 Bish., Mar. & Div., Sec. 1418. *Whorwood v. Whorwood*, 1 Rep. Ch., 223.

The principle of law that what is once adjudged is not to be retried applies in an issue of this kind, as in all others, unless the party seeking relief state and allege such facts as bring the case clearly within the exception. Hence the necessity of filing an original petition, in order that the defendant may be fully advised as to what is claimed and have an opportunity to avail himself of all the rights given him by law and the rules of pleading.

The second contention of counsel for defendant, that the affidavit contains no allegation of changed conditions, presents greater difficulties than the first contention.

It must be conceded that under the modern law of divorce the doctrine is well settled that a husband who, by his misconduct, has compelled his wife to live apart from him and secure a divorce must provide for her separate maintenance.

In most jurisdictions, including Ohio, we believe the doctrine to be that the needs of the wife and resources of the husband and his ability to earn money are the main questions to be considered in determining the wife's right to and the amount of permanent alimony allowed. It will not be denied that the sum allowed should be such as, from the circumstances of the parties and the nature of the case, shall appear just and reasonable. *Andrews v. Andrews*, 69 Ill., 609.

The sum allowed must be so clearly within the husband's ability as not to unreasonably reduce his own means of living. *Forrest v. Forrest*, 8 Bosw. (N. Y.), 640.

Just what is meant by a changed condition does not clearly appear from the authorities cited or examined by the court. The doctrine in Ohio, however, as appears in the second part of the syllabus in *Olney v. Watts*, *supra*, is that the allegations in the petition must not relate to circumstances and facts that existed and were or might have been pleaded in the former action, but to new facts “thereafter transpiring which are of such a character as to make the modification necessary to suit such altered con-

ditions of the parties." And as was said in *Meissner v. Meissner*, *supra*:

"The courts have no power to change the original order upon the facts that existed at the time the order was made, but may modify it upon any changed conditions occurring after the original decree which would authorize the court to interfere."

At the time this case was heard and decided the eldest child of the parties, Howard, as has been said, was about eighteen years of age. He was then employed earning money and contributing towards the support of the mother, the plaintiff. But the fact that this boy might, after reaching his majority, marry, was as well known then as it is now: and it must be conceded that the court had that matter in mind at the time the decree or order was made. It was as well known then as it is today that any young man, after or before he reaches majority, might possibly marry. Indeed, marriage is the natural condition of man in social life; and I can not understand how the fact that this young man is expected to contract marriage in June, 1914, can be said to be a changed condition which would authorize the court to now interfere. The fact that this young man might, and in all probability would marry after he reached his majority, is a matter that we must conclude was within the contemplation of the plaintiff at the time she brought her case into court, and was within the contemplation of the court at the time he made the order allowing permanent alimony. It was said in *Hanitch v. Hanitch*, Iddings, T. R. D., 104, that:

"Where the only reason given in a petition to modify an allowance of permanent alimony, brought a year after the rendition of the decree, are that the husband is out of employment, that the valuation of his property as agreed upon at the time of such decree was excessive, and that he is compelled to rely upon the rents of such property for his support, such petition is insufficient, since it fails to show a changed condition of the parties, or of property, though facts were unknown to the court which should have been known to him when the original case was decided."

1914.]

Conant v. Conant.

In this case the husband was seeking a modification of the decree or order, alleging that he was out of employment, and that the valuation of his property as agreed upon at the time of said decree was excessive. It was held that these were insufficient allegations to show a changed condition of the parties, and very properly so held, and for the reason that any man may be out of employment at some time, but it does not follow that because he is out of employment today, he may not have employment tomorrow. And again, the claim that the valuation of his property, as agreed upon at the time, was excessive, could not be considered, for the reason that there is no allegation that there was any mistake or fraud in reaching the valuation agreed upon. If in this case, however, the husband had alleged that his health had been permanently impaired, and that he was no longer able to work or support himself, and that his property had greatly depreciated in value, and the rents thereof had been greatly lowered, there would have been allegations sufficient to show changed conditions.

The doctrine as laid down in *Rigney v. Rigney*, 62 N. J. Eq., 8, is, that it must be clearly shown that new or previously unknown facts required a modification of the original order or decree before such modification will be granted or made. And the same doctrine is laid down in *Straus v. Straus*, 19 N. Y. Sup., 671.

In the trial of this cause, September 14, 1912, the testimony showed that the defendant was a builder, that he had no personal property or real estate, and that the profits from his occupation were problematical. What he might make on one contract by way of profits might be lost on another contract. The court allowed the plaintiff \$500 for her own maintenance, in gross, and also allowed her \$1,200 in gross, for the support of the youngest child, making a total of \$1,700; and as has been said, no objection was made at the time of the allowance; no appeal was taken, and the parties were apparently satisfied with the order made by the court.

It seems from the affidavit filed in support of the motion now before the court, that the \$500 allowed the plaintiff has been

fully paid, and that the defendant has also paid all due installments on the \$1,200 allowed for the support of the youngest child. It appears, therefore, that he has so far paid about \$900, and that there is practically \$800 still unpaid, which the defendant is apparently paying with regularity and promptness.

The court is unable to see, from the facts before it and the authorities cited, that it can afford the relief asked for by this motion, even if the first contention of counsel for the defendant was not well taken, that is, that this proceeding should be by petition. As has been already indicated, the court holds, however, that this contention is well taken, and that the plaintiff has no standing in court on this motion; that whatever rights she may have, if any, must be brought to the attention of the court by a proper proceeding, that is, by a petition in equity.

Therefore the motion will be overruled.

1914.]

Richter Grain Co. v. Railway.

SWITCHING CHARGES WITHIN MUNICIPAL LIMITS.

Common Pleas Court of Hamilton County.

THE RICHTER GRAIN COMPANY V. THE CINCINNATI, HAMILTON
& DAYTON RAILWAY COMPANY AND THE CLEVELAND,
CINCINNATI, CHICAGO & ST. LOUIS RAILWAY
COMPANY.*

Decided, October 2, 1913.

Railways—Construction of Section 9000—Fixing the Charges for Switching Within Municipal Limits.

1. A switching service, within the meaning of provisions of Sections 8998, *et seq.*, General Code of Ohio, is one which precedes or follows a transportation service, and applies only to a shipment upon which legal freight charges have already been earned or are to be earned.
2. A transportation service is not a switching service within the meaning of the foregoing sections simply because the service is between termini which are entirely within the switching limits of a municipality.
3. Where a transportation service is to be made over the lines of two connecting common carriers, between points which are entirely within the switching limits of the city, it is not a violation of the provisions of the foregoing sections for the carrier or carriers to charge in excess of the rate or rates set forth in Section 9000, General Code, provided the rate charged is fair and reasonable and in proportion to the value of the service rendered.

Waite & Schindel and Harmon, Colston, Goldsmith & Hoadly,
for the demurrers.

Charles A. Groom, contra.

GEOGHEGAN, J.

Heard on demurrers to petition.

*Affirmed by the Court of Appeals, *Richter Grain Co. v. C., H. & D. Railway Co.*, 19 C.C.(N.S.), —.

The petition contains three causes of action, but, aside from certain variations in the dates, car numbers, amounts of charges and points of destination, the three causes of action present substantially the same considerations upon the demurrers.

The first cause of action in substance recites that the Fairmount Grain Elevator is contiguous to the railroad tracks of the Cincinnati, Hamilton & Dayton Railway Company, being connected therewith by a side-track; that the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company are contiguous to the Big Four Grain elevator, and are connected therewith by a side-track; that all of the aforesaid tracks are within the proper terminal limits of the city of Cincinnati and that the tracks of the two defendant companies are connected with each other, and that the distance from the Big Four Grain Elevator to the general freight warehouse of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company does not exceed one mile. The petition further recites that on or about the 7th day of May, 1912, it caused to be transported over the Cincinnati, Hamilton & Dayton Railway Company, from said Fairmount Elevator in Cincinnati, to the Big Four Grain Elevator, one car of corn, and that it requested that said shipment be made to said Big Four Grain Elevator, and to the switch known as Big Four Grain Elevator switch, and that the defendant, the Cincinnati, Hamilton & Dayton Railway Company, demanded and received from plaintiff for transporting said car the following amounts, to-wit: From Fairmount Elevator to Cincinnati, \$5.23; for switching by the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, \$2; and there is a further allegation that both defendants did demand and receive from plaintiff for switching from the tracks of the said the Cincinnati, Hamilton & Dayton Railway Company, onto and over the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, to the said Big Four Elevator, the sum of \$2; that under the provisions of Section 9000 of the General Code they were only permitted to charge the sum of \$1.50 for the service rendered, and the plaintiff therefore prays

1914.]

Richter Grain Co. v. Railway.

for judgment against the defendants in the sum of \$150, being the amount of penalty allowed by the statute in such cases.

Both defendants filed demurrers to the petition upon the theory that the service rendered was not a switching under the purview of Section 9000 *et seq.*, General Code, but a transportation service, and that therefore the defendants were not concluded by the rates established for switching service in Section 9000, but could charge a fair and reasonable amount for said services subject to the provisions of general laws in such cases made and provided.

Section 8998 of the General Code provides that when the tracks of one company lie contiguous to coal mines, stone quarries, etc., it shall switch the cars of other companies, at the request of such companies, or the shippers, over and upon the tracks so lying by such mines, quarries, manufacturing establishments, etc., for the purpose of loading or unloading grain or other freight into or from such elevators, warehouses, etc., without demurrage, for forty-eight hours.

Section 9000, General Code, provides as to the amounts that shall be charged for said switching services, and Section 9002 provides a penalty for the violation of any of the provisions of the sections of \$150.

I do not think that the service set forth in the petition constituted a switching service as is contemplated by the provisions of the legislative act referred to above. A switching service either precedes or follows a transportation. Here, however, the express averments of the petition are that the car was to be shipped from one point, to-wit, the side-track of the Fairmount Elevator, to another point, to-wit, the side-track of the Big Four Grain Elevator. It is true that both points were within the terminal limits of the city of Cincinnati, but that fact does not of necessity constitute the service rendered a switching service. I think it was the intention of the Legislature that a switching service should be that character of service that immediately precedes or follows a transportation, that is, if it were necessary at the beginning to carry cars from a side-

track over the line of a carrier who was not to perform the transportation service in order that they might reach the lines of the carrier who was to perform the service, that a certain fixed statutory charge could only be charged by either carrier for this service, or if the cars had been transported to the terminal point and it was necessary in order to make delivery to get them to a side-track that was contiguous to the line of another railroad company, then the railroad company receiving the cars from the transporting carrier would perform the switching service and either it or the transporting carrier could only charge the sum fixed by statute for that service.

This seems to be the view taken by the Supreme Court of Georgia in *Dixon v. Railway Company*, 110 Ga., 173, wherein a switching service is defined as follows:

“A switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned, or are to be earned.”

The court in that case gives an illustration of what is a switching service as follows: If a shipment were made from Macon, Georgia, to Savannah, Georgia, the shipper would be liable for regular rates of transportation from Macon, Georgia, to Savannah, Georgia; then if the freight were to be transported from the terminal at Savannah, from the depot of the delivering company, over the track, side-track or main track of another company, to the side-track of the shipper, this carriage would constitute a switching or transfer service. Or, if the shipper desired to ship a carload from Savannah, Georgia, to Macon, Georgia, and his side-track were not connected with the road over which he desired to ship and it would be necessary to have the car transported from his side-track over the main track, spurs or side-tracks of one road to the freight station of the road which was to carry the freight to Macon, then the service required to transfer the car to the road which would carry the car to Macon, would constitute switching or transfer service.

1914.]

Richter Grain Co. v. Railway.

Now, we have no such facts presented by the petition here. Here the allegation is that the transportation was made from the Fairmount Elevator to the Big Four Elevator. It is true that the petition sets forth that the charge was made for switching, but it is not the *designation* that is given the service by either party that controls, but the *character* of the service rendered. If the service is in fact a transportation, it is immaterial that it may be designated a switching; if it is a switching it is immaterial that it may be called a transportation. The movement here is a movement between two defined and designated points. It is true they are both alleged to be within the terminal limits of the city of Cincinnati, but it does not seem that that fact alone would necessarily constitute the service rendered a switching service.

In *Grand Trunk Railway Company v. Michigan Railroad Commission et al*, 798 Fed., 1009, decided by the court of appeals of this circuit, at page 1017 the court say, in discussing certain statutes of Michigan involving charges for intracity transportation:

“It is also clear that a statute validly may, and that the statutes we are considering do, authorize the employment of such depots, side-tracks, and team tracks of a railroad for transporting car load freight to or from the junction of such road with another road as a substantial part of a continuous transportation routing, where such junction is outside the city limits. Does the fact that such junction is within the city limits necessarily differentiate the two classes of service so as to make the one a transportation within the meaning of the law and the other a mere switching service? And this in view of the fact that the distances between the city depots and tracks of a railroad and its intracity junction with another road may be as great as between such city depots and tracks and junctions outside the city, or as great as the average distance between extracity freight stations in a fairly populous section. Or does the fact that such freight movement begins and ends within the limits of a city necessarily characterize its movement between junction point and the station of receipt or delivery as a switching transaction rather than as part of an actual transportation between two termini; that is to say, between the place where the

movement begins and the place where the movement ends? Upon principle, there seems no necessary distinction with respect to either of the two cases suggested."

It is apparent here that the service rendered was a service between two termini in the city of Cincinnati. The transportation contracted for was between these two points and there is not involved in the matter such a transfer service as is designated by the Supreme Court of Georgia in 110 Ga., *supra*.

My attention has been called to the decision of Judge Gorman, in the case of *The J. B. Doppes' Sons Lumber Company v. Cleveland, Cincinnati, Chicago & St. Louis Railroad Company*, 14 Nisi Prius (N.S.), 392, decided March 22, 1913. In that case Judge Gorman recognized the well defined distinction between a transportation and a switching service, but was compelled to hold upon the pleadings as presented to him that part of the service set forth therein was a transportation and part a switching, but his decision can not in any way be construed to hold that a service is a switching service solely because it is rendered within the terminal limits of a city.

I can not bring myself to understand that it was the intention of the Legislature to include within the operation of the statute any service other than switching service as so lucidly and clearly set forth in 110 Georgia, *supra*.

I am therefore of the opinion that the petition fails to state a cause of action such as would entitle the plaintiff to recover the penalty set forth in Section 9002.

But counsel for the defendants has called my attention to the fact that since the submission of these demurrers the Supreme Court of the United States has declared that the imposition of penalties like the one provided for in Section 9002, General Code, is the taking of property without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution. The case referred to is *Missouri Pacific Railway Company v. Tucker*, decided June 16, 1913, and found in the advance sheets of the U. S. Supreme Court Reports, in the edition of August 1, 1913. In that case it was sought to recover a penalty of \$500 under a

1914.]

Richter Grain Co. v. Railway.

Kansas statute providing for the recovery of the same from any railroad company which demanded and received for a transportation service an amount in excess of that fixed by the statute. The court discusses the proposition that a common carrier is not at liberty to accept or decline shipments generally, but it must receive and carry them when offered and must be ready to name to shippers the rates at which the service will be rendered. The court holds that while it may be within the power of the state to impose double or treble damages on a carrier for overcharging transportation rates, it is beyond its power to impose a fixed amount as liquidated damages in every case regardless of, and as a general rule many times in excess of, actual damages. To do so would be to deprive the carrier of its property without due process of law in violation of the Fourteenth Amendment.

The court in that case bases its opinion largely upon the rule in *Ex parte Young*, 209 U. S., 123, wherein it was held that a law imposing penalties for overcharges of the character herein complained of, so enormous and so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, has the same result as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights. The court holds that the subject of the reasonableness of rates is one proper for judicial inquiry, but that if the penalty for the violation of rates fixed by statute is so great as to deter the officials of the railroad company from testing the same, in view of the fact that if unsuccessful the official responsible must suffer imprisonment or pay fines, is in effect to close up all approaches to the courts and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid, and the court holds that the imposition by the Kansas statute of the penalty of \$500, which is termed by the act to be liquidated damages, is so grossly out of proportion to the actual damages as to be arbitrary and oppressive and nothing short of taking property without due process of law and therefore contrary to the Fourteenth Amendment to the Federal Constitution.

While it is not necessary, in view of what I have said before, to apply this principle to the case at bar, nevertheless, I do mention it for the purpose of pointing out the view taken of legislation of this kind by the highest court in the land, especially in so far as it provides for a penalty so out of proportion to the actual damages suffered by the person complaining.

In the first cause of action here the amount of overcharge is fifty cents; in the second cause of action the amount of overcharge is fifty cents; and in the third cause of action the amount of overcharge is \$3. Still, in each cause of action it is sought to recover a penalty of \$150. However, in view of my opinion that the service set forth in the petition is not a switching service, but a transportation service, it is not necessary for me to determine that the case at bar comes within the purview of the rule laid down by the Supreme Court in the Tucker case, *supra*.

The demurrers will be sustained.

1914.]

In re Petition.

**STATUS OF THOSE WHO SIGN BOTH WET AND
DRY PETITIONS.**

Common Pleas Court of Cuyahoga County.

**IN RE PETITION TO PROHIBIT THE SALE OF INTOXICATING
LIQUORS AS A BEVERAGE.**

Decided, June 4, 1914.

Intoxicating Liquors—Proceedings for Prohibiting the Sale in a Residence District—Order in which Petitions Will be Heard—Petitions Will be Counted on the First Petition Signed, Unless—Sections 6145 and 6149.

One who signs a petition for or against the sale of intoxicating liquors in a residence district, is not at liberty to thereafter sign a petition on the opposite side and have his signature counted, unless he first proves in court that fraud or misrepresentation was used in obtaining his signature to the first petition.

Chas. M. Earhart, for the petition.

Philip Sampliner and George Shaw, contra.

ESTEP, J.

What is commonly known as a wet petition was filed with a judge of this court on the — day of March, 1914, and was docketed as case No. 138691. After the said wet petition was filed, a so-called dry petition was circulated in the same and more territory than was covered by the wet petition, and was filed with a judge of this court on the 11th day of April, 1914, and was docketed as case No. 139204.

In accordance with the provisions of Section 6145 of the code, the dry petition, being case No. 139204, was given precedence and was placed upon hearing first. It was stipulated by counsel that this petition should be granted unless the court find—

1st. That eighty-two of the electors who had signed the wet petition, and after the wet petition was filed signed the dry petition, should not be counted as qualified electors.

2d. That the block, bounded on the north by West Madison avenue and Berea road, on the east by West 106th street, on the south by Western avenue, and on the west by West 110th street, is exempt territory under the law.

In reaching a decision in this matter, I have only deemed it necessary to take under consideration the first proposition propounded.

There seems to be no dispute as to the fact that a proceeding of this character is a judicial proceeding. I still entertain doubt in my own mind as to this proposition of law, but it appears to have been otherwise decided by the Supreme Court on November 25, 1913.

Section 6149 of the code provides that no elector will be allowed to add his name to a petition after it is filed, *or withdraw his own or authorized signature from a petition, unless he can prove to the mayor or judge that it was secured through fraud or misrepresentation.*

I find nothing obscure or ambiguous in this section, and in my opinion it clearly states that after a petition is filed, no elector can have his name withdrawn from the petition, unless he can prove to the mayor or judge that it was secured through fraud or misrepresentation. A petition having been filed, and its status as to its validity or invalidity in all respects having been fixed from the time of filing the same, a person having signed the same, if found to be a qualified elector, must be found by the mayor or judge to be in favor of or against the prohibition of the sale of liquor within the territory, as the case may be. If he is a qualified elector, he can only prevent his vote from being counted by having his name removed in accordance with the express provisions of Section 6149 of the code.

It is, however, contended by counsel representing the petitioners, that Section 6145 of the code was enacted for the purpose, among other things, of permitting persons who have signed

1914.]

In re Petition.

a petition to change their minds after the first petition has been filed and its status has been fixed.

I have carefully studied the briefs relating to this section, and I am unable to place any such construction upon it.

This section provides, that when there are pending two or more petitions, including territory common to all, that petition shall have precedence containing the territory having the greatest number of resident electors; and when two petitions are filed covering the same territory, that petition shall be granted which has the greatest number of electors' signatures attached.

This section, in so far as I have previously held and now understand it, was simply intended to give precedence, in a hearing of petitions, to the one covering common territory and more territory which contains the greatest number of resident electors. In other words, it is providing for the hearing in the first instance of that petition which covers the greater territory and contains the greatest number of electors. When the territory is the same in each petition, that one shall be granted which contains the greatest number of qualified electors' signatures. This section did not intend, in my opinion, to repeal by implication Section 6149; nor did it intend to permit electors to sign wet and dry petitions indiscriminately. If the eighty-two persons signing the wet petition could, after the said wet petition had been filed, remove their names therefrom simply by signing a dry petition covering the same territory or larger territory than that contained in the wet petition, then they would accomplish by their own acts the very thing that Section 6149 provides that they can not do. While precedence is given to the hearing of the petition covering the common territory and other territory containing the greatest number of resident electors, I can not bring myself to the conclusion that the Legislature intended to provide that electors could sign petitions for and against the prohibition of the sale of intoxicating liquor in common territory, and that their vote should be counted on the petition which should be given precedence at the hearing. In order to count these eighty-two signatures upon the dry petition now before the court, it would be necessary to reach such a conclusion.

While this method of expressing an opinion upon the question of prohibiting or permitting the sale of intoxicating liquors within a residence district is not an election in the proper sense, yet it is undertaking, by the method of petition, to ascertain the sentiment upon that subject of the qualified electors within the district. If it were not for the provision of Section 6149 of the code, it might be possible for persons to be on both sides of this moral question at the same time; to have their signatures upon wet and dry petitions pending at the same time, and probably have them counted on both petitions. Section 6149, however, provides that after a petition which has been signed is filed, and the signatures of qualified electors have been affixed thereto, then they can not have their names removed from that petition, unless removed by the mayor or the judge upon the showing made that the signatures had been procured by fraud or misrepresentation.

I am of the opinion that when a voter signs a wet petition, which petition has been filed, he is not at liberty to sign a dry petition covering common territory or additional territory, until his name is removed from the wet petition in the manner provided by Section 6149 of the code, or that said petition has been dismissed or otherwise disposed of according to law.

Having this opinion in regard to the eighty-two signatures in question, I deem it unnecessary to pass upon the second proposition which has been submitted for consideration, and I therefore dismiss the petition.

1914.]

Madgett v. Traction Co.

**JUDGMENT ON THE PLEADINGS BEFORE EVIDENCE
HAS BEEN HEARD.**

Common Pleas Court of Hamilton County.

ROBERT MADGETT V. THE CINCINNATI TRACTION COMPANY.

Decided, March 14, 1914.

*Amendment—Application for Leave to Amend Comes too Late, When—
Dismissal Without Prejudice—Too Late to Demand Judgment.
When—Judgment Non Obstante Veredicto—Sections 11601 and
10214.*

1. After a jury is sworn and after either party has demanded judgment on the pleadings it is too late for the other party to ask to amend. His only remedy is a non-suit—the dismissal without prejudice.
2. It is too late to demand such a judgment after evidence has been heard upon the issues raised by the pleadings.
3. These findings do not interfere with a party's right to judgment on the pleadings in spite of the evidence, *non obstante veredicto*, but are in addition thereto.
4. Section 11601 of the General Code provides for judgment on the pleadings before evidence has been heard, and also after evidence has been heard, *i. e., non obstante veredicto*.

For statement see opinion.

Robert Black and R. T. Dickerson, for plaintiff, offered: *Buckingham v. McCracken*, 2 O. S., 287; *McCoy v. Jones*, 61 O. S., 119, 129; *Rheinheimer v. Ins. Co.*, 77 O. S., 360, 372; *B. & O. R. R. v. Nobil*, 85 O. S., 175, 182; 31 Cyc., 247, and cases there cited; *Bates Pleading Vol. 1*, page 399; *Wuest v. Cincinnati*, 13 N.P.(N.S.), 249; *Frank v. Traction Co.*, 7 N.P.(N.S.), 143; *Scott v. Hudson*, 4 Ohio Dec. Rep., 392; *Dykeman v. Johnson*, 83 O. S., 126; *Corry v. Campbell*, 25 O. S., 134; *Traction Co. v. Sanders*, 12 C.C.(N.S.), 266; *Glass v. Heffron*, 86 O. S., 70; *Traction Co. v. Stephens*, 75 O. S., 171, 178; *Traction Co. v. Forrest*, 73 O. S., 1, 5; 14 N.P.(N.S.), 577, December 29, 1913, page 15.

Joseph Wilby, for defendant offered: Section 11601, General Code; *Traction Co. v. Dorenkemper*, 13 C.C.(N.S.), 98; *Gas Co. v. Johnston*, 76 O. S., 119, 124; *White v. Calhoun*, 83 O. S., 401, 403; *New York Code*, 547; *El. Light, Heat & Power Co. et al v. Idaho Springs Inv. Co.*, 111 Pac. Rep., 834; *French v. Central Construction Co.*, 8 C.C.(N.S.), 425.

DICKSON, J.

This hearing is on a motion for a new trial—to set aside a judgment heretofore rendered on the pleadings.

The plaintiff was long in default for a necessary reply to an answer. The case was regularly set for trial, a jury duly impaneled and sworn, then—

The defendant moved for judgment on the pleadings; then

The plaintiff asked leave to file his reply, which was ready to be filed but forgotten.

The judgment was granted under the provisions of Section 11601 of the General Code:

“When upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall so be rendered by the court, although a verdict has been found against such party.”

The manner of doing justice in a court is prescribed by statute and each judge is limited by that law and not by his ideas. In order that justice may be administered speedily, rule days are prescribed for filing pleadings and all pleadings must be filed and the case at issue before set for trial. The harshness of these rules leading to and ending in justice is relieved by Section 10214 of the General Code:

“The provision of part third and all proceedings under it shall be liberally construed in order to promote its object and assist the parties in obtaining justice. * * *”

Under the provisions of this and like sections relating to mistakes and amendments, all ills of omission and commission are cured in order to get a case properly before the jury, and even if

1914.]

Madgett v. Traction Co.

a trial proceed and end full of mistakes waived or overlooked such mistakes will be corrected. No one can justly complain of the severity of our liberal code.

But there is and necessarily must be a time in the pursuit of substantial and speedy justice when both sides are ready for trial and all must assume some responsibility. Surely that time is not too soon when after all of the law's delays, after both sides have spent time and money in preparation, and at the state's expense the jury has been sworn.

The court is of the opinion that then, after the jury is sworn, is when either party may demand his right to a judgment on the pleadings.

The hearing of evidence on the issues in the pleadings would be a waiver of the right to judgment on the pleadings. Such a demand for such a judgment must be by motion upon a hearing and decided after consideration.

During these steps and before decision a party is notified of his neglect, mistake.

The mistake is admitted here by asking leave to file the reply.

The court here refused this because the defendant had a right to continuance which could not be granted without consent after the jury was sworn.

But the plaintiff had his remedy. Section 11586 of the General Code provides:

“An action may be dismissed without prejudice to a future action—

“1. By the plaintiff before its final submission to the jury or to the court, when the trial is by the court. * * *

In this instance or situation the plaintiff had a right to a dismissal, the defendant to a judgment on the pleadings. The plaintiff refused his remedy. With the jury in the box, without the consent of both parties, a continuance was impossible. The crisis demanded a dismissal by the plaintiff or a judgment for defendant. Plaintiff would not dismiss and the court followed the law.

The judgment on the pleadings without evidence may be in favor of either party, while a judgment in spite of the verdict, *non obstante verdicto*—really in spite of both the pleadings and the evidence or admissions, can only be in favor of the plaintiff or in favor of a defendant on his cross-petition, each upon the merits.

The words substantial justice are broad enough to embrace both parties, the defendant as well as the plaintiff. A court has no right to deprive a defendant of his rule day or of time to prepare his case at the bare request of a plaintiff. In such a crisis as this the court has no right under Section 11453 of the General Code—

“Because of the sickness of a juror, or accident or calamity which requires it, or with the consent of both parties, or after jurors have been kept together until it satisfactorily appears that there is no probability of their agreeing, the court may discharge the jury,”

to dismiss the jury.

The failure to file a reply or to dismiss is not such an accident or calamity requiring the jury's discharge, and the withdrawal of a juror is the same as the dismissal of the entire jury, only less manly, at best a custom. But no custom will be permitted to over-ride the written code.

The motion will be denied.

1914.]

Cross v. Real Estate Co.

**SUBLEASING OF PROPERTY HELD UNDER AN EXPIRING LEASE
WITH PRIVILEGE OF PURCHASE.**

Common Pleas Court of Cuyahoga County.

HENRY L. CROSS v. COMMERCIAL REAL ESTATE CO.

Decided, February, 1914.

Covenants—Forfeitures—Leases—Sub-lease Executed Before Termination of Original Lease Containing an Option of Purchase—Knowledge of Sub-lessee's Violation of Terms of Original Lease is a Necessary Prerequisite to Forfeiture for Unlawful Occupation—Statutory Forfeiture for Unlawful Sale of Intoxicating Liquors—Section 6207.

1. Where a lease for a term of years contains an option of purchase on the last day of the term and also a clause of non-assignment without the written consent of the lessor, a new lease made by the lessee for a term extending beyond that of the original lease will not be treated as a ground of forfeiture for assignment without written consent but rather as a sub-lease, where it appears that the lessee acted with the intention in good faith of obtaining the fee on the last day of the term, and of treating the new lease as a sub-lease and not as an assignment, and a proper tender of purchase was in fact made at the stipulated time, and the conditions of the new lease as to rental reserved, building conditions, insurance and right of re-entry are different from those in the original lease.
2. Forfeiture of a lease for breach of covenant "to permit no unlawful occupation" will not be declared unless the lessee has knowledge of the proscribed use; and where a lessee realty company sublets the premises under a like condition against such use, the covenant will not be held to have been violated by the maintenance of a house of ill-fame and the unlawful sale of liquor on the premises, where the company was without knowledge that such use of the premises had been made or was intended.
3. Neither can such a forfeiture be declared under the statute for the unlawful sale of intoxicating liquors by a sub-lessee, where the lessee company was without knowledge that such sales were being made or were contemplated.

Marvin, Smart, Marvin & Ford, for plaintiff.

Squire, Sanders & Dempsey, Cook, McGowan & Foote and Hidy, Klein & Harris, contra.

GOTT, J.

The plaintiff, Henry L. Cross, was the owner of 100 feet of land fronting on Euclid avenue in the city of Cleveland, and on January 3, 1895, he duly executed an indenture of lease, coupled with an option to purchase, to William A. Vliet and Charles L. Pack, for a period of fifteen years, or until December 31, 1909. On September 24, 1895, with the written consent of the plaintiff, Pack and Vliet duly assigned the lease to the defendant, the Commercial Real Estate Company, which assignment is as follows:

"Cleveland, Ohio, September 24, 1895. I, Henry L. Cross, the lessor mentioned in the lease dated January 3, 1895, referred to in the within assignment of lease, do hereby consent to said assignment as provided for in the sixth article of said lease dated January 3, 1895. The consent is granted without releasing the said Charles L. Pack and William A. Vliet from any of the obligations of said original lease so dated as aforesaid. Henry L. Cross."

At this time, Euclid avenue, at the location of the Cross homestead, was a residence district, though it was so closely situated to the business part of Euclid avenue that the original lessees, Pack and Vliet, foresaw that in the course of years business would be pushed down Euclid avenue, and the value of the Cross property greatly enhanced.

The Commercial Real Estate Company, after the assignment of the lease to it, entered into possession of the property and immediately began subleasing the premises for residence purposes, and later for rooming-house purposes; and the company, by the assignment, being in privity with the plaintiff, will hereafter be designated as the lessee. Business, however, it is claimed by the defendant, was much slower in moving down Euclid avenue than it was anticipated, and the defendant realty company claims that up to the last year of the lease it had lost in the neighborhood of \$20,000.

This indenture of the date of January 3, 1895, was not only a lease, but it contained an option to purchase at the end of the term for the sum of \$90,000: and this suit is at this time one

•

1914.]

Cross v. Real Estate Co.

concerning certain acts of alleged forfeiture of the lease during the term of the lease, and therefore an ending of the option to purchase, and it can be best understood and followed by an analysis of the clauses of the instrument. They are as follows:

First. "Rent of \$3,000 in semi-annual payments on April 1 and October 1, during the continuance of the lease, to be deposited to the credit of lessor at the Guardian Savings & Trust Company."

Second. "As a part of the consideration of said lease, and in addition to the rental hereinbefore provided, said lessee hereby covenants and agrees to indemnify and save harmless the lessor, said ground, the premises demised and improvements thereon, from all taxes and assessments levied and assessed during the term of this lease, beginning with the taxes and assessments for the year 1895 and ending with the taxes and assessments for the year 1909, and free from all charges, liens, penalties and claims for damages chargeable to or payable for or in respect of said ground or the rentals to accrue thereon during said term, and to punctually pay, in addition to the rents above provided for, all such taxes, assessments and other charges as aforesaid and, upon application of said lessor in writing, to furnish said lessor with written evidence duly certified, that any and all such claims are duly satisfied. And the said lessee does hereby agree to pay the rents, taxes, assessments and other charges as hereinbefore provided, and the said lessee hereby agrees to promptly and fully obey and comply with all requirements, rules, regulations, laws and ordinances of all legally constituted authorities in any way affecting said premises, buildings and improvements on or about the same, or the use of the same, existing at any time during the continuance of this lease, and to permit no unlawful occupation to be carried on upon said premises and no use to be made of any part thereof contrary to any law or ordinance governing the same."

Fourth. * * * "Provided, however, that said lessee shall have and is hereby given the privilege of altering, removing and destroying the buildings and improvements now upon said premises, but only on the condition that the lessee shall proceed immediately after the altering, removing or destroying of such buildings and improvements, to so alter or repair such buildings and improvements, or construct a new building upon said premises that the same shall be of equal or greater value when completed than the one altered, removed or destroyed; and lessee agrees to and does hereby become responsible to lessor

for any and every damage that may accrue to lessor by reason of the failure of lessee to finish and complete such altered building or to replace such removed or destroyed building."

Sixth. "The lessee further covenants and agrees not to assign or transfer this lease at any time, except with lessor's consent in writing, unless the rents and all charges, taxes and assessments, liens, penalties and claims for damages which the lessee has herein covenanted to discharge, have been duly discharged and satisfied, nor unless the assignee shall expressly assume the lessee's engagements hereunder, nor unless the lessee shall have first placed in the hands of the lessor for inspection during the period of ten days a legal and sufficient instrument of assignment and acceptance which shall, before its execution, be satisfactory to lessor, nor unless by instrument recorded at or about the time of delivery in the proper recorder's office. Provided, however, that the lessee may at any time, directly or by conveyance in trust for that purpose, mortgage his estate in the premises to secure any actual debt, and make all insurance exceeding \$10,000 above stipulated payable in case of loss to said trustee or mortgagee. It is covenanted and agreed that no assignment hereof shall be made except in accordance with the above stipulation or by way of devise."

Eighth. "This lease is made upon the condition that the lessee shall punctually perform all covenants and agreements herein set forth to be performed by said lessee, and that if at any time the rent, taxes, assessments and other charges and payments aforesaid, or either of them, or any part thereof, shall become in arrears and unpaid for the period of ninety days after becoming due, or if any of the covenants or agreements aforesaid shall not be performed as hereinbefore stipulated and agreed to be performed by said lessee, the said lessor, at any time thereafter, shall have full right at his election, without further demand or notice, to enter upon the above described premises and bring suit for and collect all rents, taxes, assessments, payments or other charges which shall have accrued up to the time of such entry, and thenceforth from the time of such entry this lease shall become void to all intents and purposes whatsoever, and this lease and all improvements made upon said premises shall be forfeited to said lessor without compensation therefor to said lessee. Provided, also, that for rents due and non-performance of condition, the lessor may sue at once but not enter upon forfeiture for three months."

Tenth. "Lessor hereby gives and grants unto said lessee, their heirs, executors, administrators and assigns, an option to purchase the premises described in this lease at the expiration

1914.]

Cross v. Real Estate Co.

of the term hereof for the sum of \$90,000 cash. In the event said lessee desires to exercise this option, they shall notify said lessor, his heirs, executors, administrators or assigns, of his election to purchase said premises, by delivering, not more than four months nor less than thirty days prior to the expiration of the term of this lease, written notice of such election to said lessor, his heirs, executors, administrators or assigns, or by depositing such notice with the Guardian Trust Company, of Cleveland, Ohio, or at such other place or with such other person or corporation as shall at that time be designated for the payment and receiving of the rents hereunder. And, in the event of the acceptance of this option by said lessee, his heirs, executors, administrators or assigns, said \$90,000 shall be paid in cash to said lessor, his heirs, executors, administrators or assigns, on December 31, 1909. This option is a part of this indenture and runs with the same. It is given in consideration of the punctual payment of the rents provided for hereunder and the like performance of all of the covenants, agreements, stipulations, terms and conditions of this instrument. It can not be assigned except with this instrument, and shall be terminated by the termination of this lease from any cause whatsoever."

On March 10, 1909, or about ten months before the expiration of the lease and six months before the defendant could give notice of its election to purchase under the option, the defendant, the Commercial Real Estate Company, lessee, made, executed and delivered to one William M. Brown a lease for, the term of ninety-nine years beginning on the first day of July, 1909, six months before the expiration of the original lease. This ninety-nine year lease from the defendant, the Commercial Real Estate Company, to Brown, included all of the Cross premises and also fifty feet of land immediately east of the Cross premises which was owned in fee by the Commercial Real Estate Company, and, in this new lease Brown agreed to erect a much more valuable building than was provided for in the lease in question from Cross to Pack and Vliet. The covenants are different. The Commercial Real Estate Company had the right of re-entry for condition broken; the rent is increased to such an extent that it shows a difference in the value of the premises of over \$200,000.

The Commercial Real Estate Company also executed an option to purchase to Brown for the whole frontage of 150 feet, to be exercised only after December 31, 1909. This option was by separate agreement, but was made at the same time as the ninety-nine years lease. Cross, lessor, had reserved in his lease the wood mantel, mirror and chandeliers, with the right to remove them at any time he might elect, but in the event of the remodeling or a tearing down of the old homestead, he was to remove them upon reasonable notice to him by the lessee; and on May 22, 1909, the Commercial Real Estate Company notified him to so remove the mantel, mirror and chandeliers, which he did, and Brown began tearing down the Cross house for the purpose of erecting the new building.

On August 14, 1909, the plaintiff brought suit against the original lessees, Pack and Vliet, for the recovery of the possession of the premises on grounds of forfeiture, claiming a violation of covenant "two" of the lease, in that the defendants had permitted the premises to be used for the purpose of an assignation house, and had permitted the unlawful sale of intoxicating liquor on the premises; and, second, that the defendants had violated covenant "sixth," not to assign the lease without the written consent of the plaintiff, lessor, and plaintiff prayed to be restored to possession.

It seems that the plaintiff had either neglected to inform his counsel of his consent to the assignment from Pack and Vliet, or had forgotten that he had given his consent to such assignment; and upon discovering the same, the plaintiff filed his amended petition, which was the same as his original petition except that the Commercial Real Estate Company was made a party, and the assignment and the consent to the same were averred.

At the time specified in the opinion, September 2, 1909, the defendant, the Commercial Real Estate Company, duly notified the plaintiff, Cross, of its election to take the premises as provided in the option, and on December 31, 1909, the last day of the lease, and the day named in the option to purchase, the defendant duly tendered the \$90,000 in gold and demanded a

1914.]

Cross v. Real Estate Co.

deed from the plaintiff, which he refused. On December 30, 1909, the day before the last day of the lease, a second amended petition was filed, and in November, 1911, the case, being at issue by proper answers of the defendant, came on for trial before another branch of this court. That battle, however, was not finished, and the trial was stopped and plaintiff was granted leave to file a third amended petition and Brown was made a party defendant.

The original action was one in ejectment for a breach of the covenants of the lease. At the time it was filed, the lease had five months to run. But the leasehold ended on December 31, 1909; and the defendant, the Commercial Real Estate Company, or Brown if he is assignee, after that date held possession, not by the terms of the lease, for it had expired, but held possession because it claimed to have exercised its option, made its tender according to the terms of the option, and the action was still one in ejectment. By clause "ten" of the lease, "This option is a part of this indenture, and runs with the same. It is given in consideration of the punctual payment of the rents provided for hereunder and a like performance of all of the covenants, agreements, stipulations, terms and conditions of this instrument. It can not be assigned except with this instrument, and shall be terminated by the termination of this lease from any cause whatsoever." So that if the lessees, by any act of theirs, terminated or forfeited their lease during its term of fifteen years, such act would also forfeit the option, and plaintiff could bring an action to cancel it or he could plead such act to any action for specific performance of the option contract. It is true, too, that all the covenants, conditions, etc., of the lease are made conditions, covenants, etc., of the option; so that the instrument did not provide that the option "shall be terminated by the termination of this lease from any cause whatsoever," yet the legal effect is to rewrite all the conditions and covenants of the lease in the option as fully as though they were repeated in the option, and plaintiff has the same rights under the option for a violation of its terms as he has for a violation of the terms of the lease.

This indenture is a single instrument, founded and supported by one entire consideration concerning two subjects, a lease and an option, and it contains specific covenants and stipulations touching the obligations of the parties as lessor and lessee, and as vendor and vendee in the event of the election to purchase (*Gilbert v. Port*, 28 Ohio St., 276). Ejectment was the remedy until April 11, 1910, when Cross entered into a land contract with Brown, who was in possession up to that time by virtue of his ninety-nine year lease from the Commercial Real Estate Company, whereby Cross agreed to convey to Brown the premises in question, and to give him a warranty deed as soon as he could get his title cleared, that is to say, get this option of the date of January 3, 1895, from Cross to Pack and Vliet canceled. This action of Cross in granting the land contract to Brown extinguished his remedy of ejectment and gave birth to the action as it now stands, an action to cancel his contract, and thereby quiet his title as against those who claimed any right under that contract.

THE ISSUES.

The plaintiff therefore claims, as it appears to me, that he gave this option, together with the lease, to Pack and Vliet, that they assigned it to the defendant, the Commercial Real Estate Company; that this option contained all the above enumerated covenants; that he performed all the conditions and agreements on his part to be performed, but that the defendant, the Commercial Real Estate Company, did not so perform its covenants and agreements, but that it wrongfully, and without any right, did break the covenants and agreements and failed to perform the conditions on its part to be performed in this. to wit:

First, that it violated the covenant not to permit the premises to be used for any unlawful purpose (clause II of the option and lease) by permitting and allowing a house of ill-fame to be conducted thereon, during the continuance of the lease, and a further violation of that clause by permitting said premises to be used for the unlawful sale of intoxicating liquor, which acts were both in violation of the covenants of the lease and the or-

1914.]

Cross v. Real Estate Co.

dinances of the city of Cleveland and the laws of the state of Ohio.

Second, that, in violation of the covenant (No. VI) "not to assign except with the written consent of the lessor," the defendant the Commercial Real Estate Company did, on March 10, 1909, execute a lease of all of said premises to the defendant, Brown, for a term of ninety-nine years beginning on July 1, 1909, and ending on June 30, 2008; and that simultaneously with the execution of the said ninety-nine year lease, the Commercial Real Estate Company granted an option to purchase to Brown; that by so doing it assigned away all of its term and interest in said premises; that this was an assignment in law, and that it was done without knowledge or consent in writing of the plaintiff; that Brown went into possession on July 1, 1909, and began the tearing down of the buildings.

The petition also sets forth the option, and that the defendant the Commercial Real Estate Company claims the premises by virtue of the option; that said option and adverse claim is a cloud upon his title; that the defendant the Commercial Real Estate Company is collecting the rent from Brown in violation of plaintiff's right to receive the same, and prays for an accounting, that the option be canceled, and plaintiff's title quieted, and for such other and further relief as equity and good conscience may allow.

The defendant denies that it has violated any of the terms of either the lease or the option; admits that it made the ninety-nine year lease to Brown and gave him an option to purchase, but alleges that this lease and option to Brown is not an assignment of its lease, but that it is a sublease from it to Brown, founded upon the remainder of their leasehold and then upon their right to purchase, their right to a deed in fee simple from the plaintiff on the last day of their leasehold. It alleges that on September 3, 1909, this defendant duly notified the plaintiff of its election to exercise its option to purchase, and avers that on December 31, 1909, the day named in the option, it duly tendered to plaintiff the sum of \$90,000 in gold, as in said option required, and demanded a deed for said premises.

As a further defense by way of waiver and estoppel, the defendant alleges that on June 15, 1896, plaintiff and his wife, Stella Cross, sold, assigned and transferred to the Guardian Trust Company all their right, title and interest in and to said lease, the rents therein reserved and the option therein given, and that since March 10, 1909, and later than the filing of his petition, plaintiff, by other instruments in writing, has assigned and transferred all his interest in said lease, the rents reserved therein and the option given, to said trust company.

By its supplemental answer, the defendant avers that the plaintiff and his wife, on August 29, 1913, gave, granted, bargained, sold and conveyed unto the National City Bank, of Cleveland, the premises about which arises this controversy, and sold, assigned and transferred to said bank all their right, title and interest in and to the lease and option, and by said instrument of conveyance warranted and covenanted that he, the said Cross, was well seized of the premises and was the true and lawful owner of the lease and option.

Defendant further avers that Cross, for the consideration of one dollar, ratified and confirmed the lease from Brown to the Cleveland Athletic Club of the upper stories of the building; and that, inasmuch as Brown is in possession under them, therefore Cross has recognized the validity of its lease to Brown.

Defendant avers that it sought to obtain from plaintiff, in December, 1908, and in the early part of 1909, a deed in advance; that it was then negotiating with Brown for the ninety-nine year lease, and that such facts were known to plaintiff and his agent, the Guardian Trust Company; that the lease to Brown for ninety-nine years was made on March 10, 1909, and that plaintiff and the Guardian Trust Company were advised of the making of the lease and made no objection thereto, but acquiesced in the same, and, with such knowledge, received the rent due April 1, 1909; and that by reason of these acts, conduct and silence on the part of plaintiff, and his wife, the plaintiff can not maintain this action; that he has acknowledged and recognized the validity of the original lease, and has waived any forfeiture, and is estopped from claiming a forfeiture of the instrument.

1914.]

Cross v. Real Estate Co.

By way of cross-petition, the defendants, by proper averments, ask for specific performance of the option to purchase.

Plaintiff by reply admits the execution of the instruments to the Guardian Savings & Trust Company, but avers that such instruments were mortgages for security for certain loans, and that said mortgages contained the usual defeasance clauses; admits the execution of the instrument under date of August 29, 1913, from him to the National City Bank; admits that he gave, bargained, sold, etc., to said bank the premises described in the fourth amended and supplemental petition, and that he sold, assigned and transferred to said bank all his right, title and interest in the lease, and the rents reserved therein, and to the option from himself to Pack and Vliet; and further alleges that he also conveyed to said bank by said instrument all his right, title and interest in the land contract from himself to Brown of the date of April 11, 1910; and he says that said instrument was a conditional instrument, and given merely as security for a loan which was due the bank. He admits that he received the rents due April 1, 1909, but denies that he had any notice or knowledge of the lease to Brown at that time, and alleges that the defendant, the Commercial Real Estate Company, without his knowledge or consent, executed said lease, and, in order to keep the knowledge of the making of such lease from him, the defendant withheld the lease from record until September, 1910; and he denies that any of his conduct or acts misled the defendant into making the lease to Brown, or that his acts or conduct constitutes a waiver of the forfeiture or is an estoppel to his prosecution of this suit.

Plaintiff's answer to the defendant's cross-petition for specific performance is practically the facts and averments of his petition. He admits the notice to exercise the option, and the tender of the \$90,000 in gold, and that the same was refused.

**FINDING OF FACT AND LAW AS TO THE ALLEGED ILLEGAL USE OF
THE PREMISES.**

The court finds from the evidence that one Mrs. Sherman was a tenant of the defendant, the Commercial Real Estate Com-

pany, and that during her tenancy she conducted a house of ill-fame where persons of the opposite sex met for the purpose of prostitution and lewdness; and that, during the same tenancy, there were unlawful sales of intoxicating liquors on such premises. That the said Mrs. Sherman occupied the premises and conducted said house of ill-fame and made illegal sales of intoxicating liquors from October, 1906, to June, 1907; and the court further finds that such illegal use of the premises in question is confined entirely to the tenancy of Mrs. Sherman.

The court further finds that neither the defendant the Commercial Real Estate Company nor any of its officers had any knowledge whatsoever that a house of ill-fame was being conducted there by the said Mrs. Sherman, nor did it or they know or have any reason to believe that there were unlawful sales or giving away of intoxicating liquor on said premises by the said Mrs. Sherman. And the court further finds that neither the Commercial Real Estate Company nor its officers knowingly permitted said illegal or unlawful uses of said premises.

Do these facts constitute a statutory forfeiture of the lease?

The statute directly involved is Section 4361, Revised Statutes (6209, General Code), which provides:

“ * * * The unlawful selling or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon premises where such unlawful sale or giving away takes place.”

If a sub-lessee makes unlawful sales of intoxicating liquors, will that work a forfeiture of the lease from the lessor to the lessee? This question has never been passed upon by the courts of Ohio. In 1854 (52 O. L., 153) the Legislature passed an act “Providing against the Evils Resulting from Sale of Intoxicating Liquor;” and in 1879 (67 O. L., 101), Section 7 was amended to read as it now reads in Section 4361, Revised Statutes, and Section 10 amended to read as now reads, Section 4364, Revised Statutes. Both of these sections have been construed by our Supreme Court where the question is between the lessor and lessee, but not a great deal of aid is given to the solution of the question here presented.

1914.]

Cross v. Real Estate Co.

In *Zink v. Grant*, 25 Ohio St., 355, the court fell into error as to the section which applied to that case, using Section 10 instead of Section 7; but in its opinion it uses the following language:

"It would require the most explicit terms to justify the conclusion that the Legislature intended to deprive a lessor who had not offended against the policy of the law, in thought or deed, of the benefit of his contract.

"The guilty lessor takes nothing by his contract, while the innocent is protected in his rights."

In *Goodall v. Brewing Co.*, 56 Ohio St., 257, the Supreme Court construed Section 4364, Revised Statutes (originally Section 10), which was passed at the same term as the section in question. Section 4364 provided that "All contracts whereby any premises are rented, and the same shall be used and occupied for the sale of intoxicating liquors, shall be void." In construing this section, the court read into it, after the words "for the sale of intoxicating liquors," the words "contrary to law." On page 260 the court uses the following pertinent language:

"All sales of intoxicating liquors are not illegal; only such are so that are defined and prohibited; and the sales to which reference is made are such as are defined and prohibited; and none but such sales affect in any way the validity of a contract of lease. * * * To hold otherwise would impute to the Legislature a great want of consistency. Neither a civil nor a criminal liability can with consistency be attached to the doing of a lawful act." * * *

There can be no reason against the validity of contracts that "have for their object simply the lawful conduct of the business."

"It was early announced as a rule of construction in Ohio, that whatever may be the nature or kind of forfeiture, it is never carried beyond the clear expression of the statute creating it."

It should be the policy of the law to punish the guilty and to shield the innocent; and while the statute under consideration was passed by the Legislature for the purpose of checking

the evils resulting from the unlawful sales of intoxicating liquor, yet it would seem to be an unwarranted construction of the statute to say that the innocent lessee, whose sub-tenant unlawfully sold liquor on the premises, should have his lease forfeited by such unlawful sale. As said by Judge Nye in *State v. Maloney*, 6 Dec., 209; 4 N. P., 197, "It is carrying the doctrine too far to hold that a person who leases his property for a legitimate purpose, and who had no knowledge of its use for any other purpose, should be held liable for the unlawful use of said property by the tenant without any knowledge of the unlawful use."

The state of Oklahoma has the following statute:

"All leases between landlords and tenants under which any tenant shall use the leased premises for the purpose of violating any provision of this act, shall be wholly null and void, and the landlord may recover possession thereof as in forcible entry and detainer."

In construing this statute on February 11, 1913, the Supreme Court of Oklahoma held that the lessee's lease was not to be forfeited or canceled at the suit of the landlord, lessor, for an infraction of the statute by a sub-tenant of the lessee, unless the violation was permitted or continued with the knowledge of the lessee. And the court concludes with the following reasoning:

"The unreasonable consequences, if not to say unconstitutional results, which would follow any other holding seem to us to be apparent at a glance. Suppose, to strengthen the example of the case here before us, that Street and Reed owned this entire city block with its several hundred buildings and rooms, and that they leased the entire property to Tull. That Tull then leased it to several hundred different people, who entered upon their occupancy and engaged in their different occupations and uses therein, and then, without the knowledge of either Tull or any of these other sub-lessees, some of them in some distant corner of this property should surreptitiously engage in the illegitimate sale of intoxicating liquors. Is it be contemplated for a moment that the rights and contracts of this great body of people should, because thereof, be swept out of existence, and the primary landlord be permitted to enter and oust all of such innocent holders?

1914.]

Cross v. Real Estate Co.

“A statement of the proposition, in our judgment is sufficient to refute the contention; and we therefore hold the judgment of the court was erroneous in holding for cancellation Tull’s lease as to the square of ground located in the center of the block, and the case is remanded with instructions to set the said judgment aside and enter one in accordance with this opinion.”

The court therefore holds, that the lease forfeited by Section 4361, Revised Statutes, is the lease of the sub-tenant, the one who does the unlawful act; and that the lease of the lessee, who has no knowledge of the unlawful sales of intoxicating liquor, is not forfeited by that statute. To hold otherwise is neither warranted by the words nor intent of the law. Forfeiture being abhorred by the law, should never be carried beyond the clear expression of the statute creating it.

FINDING AS TO CLAUSE II OF THE LEASE.

The second clause of the lease is as follows:

“As a part of the consideration for said lease, and in addition to the rental hereinbefore provided, said lessee hereby covenants and agrees to indemnify and save harmless the lessor, said ground, the premises demised and improvements thereon, from all taxes and assessments levied and assessed during the term of this lease, beginning with the taxes and assessments for the year 1895 and ending with the taxes and assessments for the year 1909, and free from all charges, liens, penalties and claims for damages chargeable to or payable for or in respect of said ground or the rentals to accrue thereon during said term, and to punctually pay, in addition to the rents above provided for, all such taxes, assessments and other charges as aforesaid and, upon application of said lessor in writing, to furnish said lessor with written evidence duly certified, that any and all such claims are duly satisfied. And the said lessee does hereby agree to pay the rents, taxes, assessments and other charges as hereinbefore provided, and the said lessee hereby agrees to promptly and fully obey and comply with all requirements, rules, regulations, laws and ordinances of all legally constituted authorities in any way affecting said premises, buildings and improvements on or about the same, or the use of the same, existing at any time during the continuance of this lease, and to permit no unlawful occupation to be carried

on upon said premises and no use to be made of any part thereof contrary to any law or ordinance governing the same."

The court has already found, under statutory forfeiture, that there was a house of ill-fame conducted by a Mrs. Sherman, a sub-tenant of the Commercial Real Estate Company, upon the premises, and that she unlawfully sold and gave away intoxicating liquor on said premises at said time, and that neither the Commercial Real Estate Company nor its officers had any knowledge as to this unlawful use of the premises, by its sub-tenant.

The claim here presented is, that the defendant the Commercial Real Estate Company violated the covenant "To permit no unlawful occupation to be carried on upon said premises, and no use to be made of any part thereof contrary to any law or ordinance governing the same."

We approach a construction of this clause with the fundamental principle that forfeitures are strictly construed against the person claiming them, and any doubt or ambiguity is to be resolved against the person claiming the forfeiture. *West v. Insurance Co.*, 27 Ohio St., 1, 13; *State v. Boyce*, 43 Ohio St., 46.

The covenants and conditions in a lease are strictly construed against the lessor, and such construction will be given the language used as to defeat a forfeiture if possible. *Gilbert v. Port*, *supra*.

The defendant contends that the word "permit" implies knowledge, and that there was no violation of this covenant, the court having found that the defendant had no knowledge of the illegal uses by the sub-tenant.

On the other hand, the plaintiff contends that this clause, "to permit no unlawful use," etc., is a covenant that there shall be no unlawful use of the premises in any event, or that the court should adopt the same construction of this covenant in Ohio as was adopted by the courts of Massachusetts as to the covenants "to suffer no unlawful use of the premises," the courts there holding that "an unlawful use of the premises by a sub-tenant is a breach of the covenant to make or suffer any unlawful use of the premises, whether known to the lessor or not."

While the courts of Ohio have passed upon the word permit

1914.]

Cross v. Real Estate Co.

as used in the criminal statutes and as used in pleadings, yet very little aid is given here, for the reason that this case is one for the forfeiture of a lease where every doubt is resolved against the lessor.

Robinson v. Greenville, 42 Ohio St., 625, was a negligence case against a municipality for permitting the firing of a cannon in the public street, whereby plaintiff was injured, and the allegation that the "authorities permitted" was said to mean, "took no measures to prevent;" but there were other allegations in the petition alleging that the village had full knowledge of the firing of the cannon, and that they took no measures to prevent.

In *Ackerman v. Thompson*, *supra*, heretofore cited, "To permit means either, first, to suffer, or allow to be, to come to pass; or take place by tacit consent or by not prohibiting or hindering; or, second, to grant leave or liberty by express consent; to allow expressly."

There are many decisions in other states supporting each of the contentions herein, but that construction of the word "permit" which has in it the element of knowledge appears the more reasonable one to apply to a forfeiture case.

In *Gregory v. United States*, 10 Fed. Cas., 1195, it is said:

"Every definition of 'suffer' and 'permit' includes knowledge of what is done."

Such construction also was given in the following cases:

Gray v. Stienes, 69 Ia., 124; *Ball v. Campbell*, 6 Idaho, 754; *Chicago v. Stearns*, 105 Ill., 554; *State v. Robinson*, 55 Minn., 169.

I do not believe that the courts of Ohio will follow the doctrine of the Massachusetts cases. It would seem to be both harsh and unjust to apply such a rule in this case. The defendant had entered into a sub-lease to one Krieger, who had occupied the premises for a number of years; and he, with the consent of the defendant, had transferred such lease to Mrs. Sherman, alias Lee. The lease was one of the ordinary form, and such as is used by every landlord in Ohio. That lease had

the usual covenants within it, including the covenant against the sale of liquor. There was nothing in the appearance of Mrs. Sherman to indicate that she belonged to that class of persons who keep houses of ill-fame. Nor is there any duty of a landlord to hire watchmen or detectives to keep his premises under surveillance. This house was located on Euclid avenue, the most prominent street in the city and within a stone's throw of churches and other religious institutions. Can it be said that the lessee, under these circumstances, failed in his duty in that he "took no measure to prevent" when there was no circumstance which should arouse his suspicion of the unlawful purpose for which the house was being used?

True, the court finds that the house, from October, 1906, to June, 1907, was a house of ill-fame—known in the neighborhood as such—and therefore plaintiff contends should have been known to the defendant. But if such ill-fame should have been known to defendant, so also should it have been known to the plaintiff, and he could not now complain because of his laches in asserting his right, nor could he complain having such knowledge and having received the rents for two years subsequent thereto. The truth is, that neither plaintiff nor defendant knew of the unlawful uses of the premises up to July or August, 1909.

What was the intention of the parties? The whole of clause II should be read and construed together. Examine it as a whole.

The "lessee covenants and agrees to indemnify and save harmless the lessor, said ground, the premises and improvements thereon from all taxes and assessments * * * and free from all charges, liens, penalties and claims for damages * * * and to punctually pay all taxes, assessments and other charges as aforesaid, * * * to promptly and fully obey and comply with all requirements, rules, regulations, laws and ordinances of all legally constituted authorities in any way affecting said premises, and to permit no unlawful occupation to be carried on upon said premises, and no use to be made of any part thereof contrary to any law or ordinance."

1914.]

Cross v. Real Estate Co.

The court holds that the word "permit" has within it the elements of knowledge, and that there being no knowledge on the part of the defendant realty company as to the illegal uses of the premises, there was no violation of the covenant to permit no unlawful use. That if the state placed liens or penalties upon the premises for the unlawful uses by the sub-tenant, Mrs. Sherman, then the plain intention was that the lessee must pay such assessment or penalty, and a failure so to do would have been a plain violation of the covenant and a ground of forfeiture. But the state did not do so. No damage was done the premises, though there was an injury to the public morals. Plaintiff had made a solemn written contract to convey the premises to defendant for \$90,000, and defendants desire to stand by said contract and pay said sum therefor. That there was no damage to plaintiff is clearly shown by the fact that defendants agree to pay the contract price. The truth is, that the premises have greatly increased in value, an unearned increment of over \$250,000, and that this controversy arises on both sides by reason of that fact. Contracts are not to be set aside except upon clear and convincing proof of a violation of their terms. Equity abhors a forfeiture, and will never grant relief except where the violation is plain, certain and substantial, and the courts holds that there was no violation of covenant II.

FINDING AND LAW AS TO THE ASSIGNMENT.

It is admitted that the ninety-nine year lease and the option from the defendant to Brown was made on March 10, 1909, and that such lease was to begin on July 1, 1909, and that the ninety-nine year lease used up all of the balance of the fifteen year term of the original lease, and extended over ninety-eight years beyond the original term. It is admitted that the lessee, the Commercial Realty Company, at the time it made the ninety-nine year lease, had an option to purchase on the last day of the term; and that the court finds that it at that time intended to exercise its option and get the fee on said last day. The court finds that the premises conveyed in the ninety-nine year lease were different; that it contained the original 100 feet belonging

to plaintiff and fifty feet owned by defendant; that it reserved the right in the defendant to re-enter for breach of covenant; that the rental was different; that there were covenants in the instrument not in the original; that in form it was a lease and not an assignment, and that the parties thereto intended it as a lease, and not an assignment.

WAS THE NINETY-NINE YEAR LEASE AN ASSIGNMENT IN LAW?

This question has, after a study of all the authorities, caused more trouble than any question presented in the case. There seem to be authorities on each side of the proposition, but the text-books generally answer in the affirmative. *Tiffany, Landl. & Ten.*, Section 151; *Wood, Landl. & Ten.*, Section —; *Taylor, Landl. & Ten.*, Section 16.

And there are many decisions, ancient almost to the point of veneration, to the same effect. It is to be noted, however, that the question usually arises in those cases when the landlord is seeking to hold the under-tenant for rent due by the terms of the original lease. Like many of our laws in regard to real property, it had its origin in the feudal system. To the overlord a service of fealty was due from the tenant by virtue of his tenure; and if the lessee parted with his whole estate, he who took over this estate was put in the place of the original tenant and was bound by the original tenant's covenant to render the military service. Such is the origin of the rule which plaintiff seeks to enforce in this action. Under these holdings, if the original tenant held but the very shred of his estate, one minute out of a ninety-nine year lease, a new estate was carved out of the original estate and there was a sub-tenancy and not an assignment, and the original tenant marched off to war while the sub-tenant stayed at home and attended his harvest.

There is no case by four corners in Ohio. In 1846, however, the Supreme Court had before it the case of *Jones v. Smith*, 14 Ohio, 606. On May 25, 1835, one Dixon leased to the defendant Smith and to one Gray a two-story house with a certain quantity of household furniture for a term of five years, with

1914.]

Cross v. Real Estate Co.

rent at \$120 per year. On September 4, 1837, Dixon conveyed to plaintiff's intestate the house and lot but not the furniture. Suit for rent by the new landlord, with answer that defendant had paid all rent in full to Dixon. The covenant is to pay rent for the use of both the realty and the personalty. The consideration is entire. The realty was conveyed, the personalty was not. The court, on page 609, uses this language:

"How much of the entire rent is the consideration for the realty, and goes to the assignee for the lease, and how much should be retained out of the personalty for the lessor, from whom it is not conveyed by any grant or assignment? In our view, no such partition can be made, and if the whole term, and the whole interest in the term, is not conveyed, it is no more an assignment which can be enforced in his own name, by the assignee, of the lessor, than the assignee of the lessee."

Fulton v. Stuart, 2 Ohio, 216, lease of a part of the premises for the whole term, and the court held:

"Where a lessee assigns a part of the premises leased to a third person for the whole period of time of the lease, it is but an under leasing and the lessor can sustain no action on the lease for rent against the assignee."

The court say:

"In this case the declaration states that the defendant was not assignee of the whole premises; he did not take and does not hold the whole term of the original lessee."

In *St. Clair v. Williams*, 7 Ohio (pt. 2), 110, it is said: "The assignee is he who holds the whole estate or term."

In *Worthington v. Ballauf*, 7 Bull., 46; 10 Rec., 505, it is said, as to what constitutes an assignment of a lease, "it is unnecessary to observe further than it must convey to the assignee the whole of the term and the whole estate of the lessee. If a day of the term or a particle of the estate be reserved, the transaction is not an assignment but a subletting."

In *Powder v. Neiss*, 7 N.P.(N.S.), 1, Margaret Herb leased to one Neiss for a term of years. During the term Neiss leased for the remainder of the term to one Tschirret. Before the

end of the original term Tschirret, by written instrument, let the premises to plaintiff, Powder, at the same rental, and again for the whole of the unexpired term. Subsequently Herb, the original lessor, brought suit before a justice in forcible entry and detainer against Neiss, lessee, Tschirret, sublessee, and Powder, second sublessee, and recovered a judgment of restitution. Neiss did not appear, and Powder, second sublessee, paid Herb, the original lessor, \$100 in consideration of her allowing him to remain the balance of the original term. Powder sued Neiss for the \$100. Judgment for defendant.

On page 4 the court says: "There was a question of assignment or subletting."

And on page 5:

"The only thing that can be urged, and in fact is urged, in support of the position taken by the plaintiff in that regard, is the fact that the time limit named in the two leases is identical. But the authorities cited seem to me to clearly show that the word 'term' does not merely signify the time specified in the lease, but the estate also, and it is an elementary principle in interpreting all contracts that, if the intention of the parties is clear from the instrument itself, the intention should govern. How then can it be contended in this case that such was the purpose of drawing up that formal instrument, specifically setting forth the intention of these parties, their agreement with reference to this property, not only as to the amount as to the time that the contract should run, but that at the end of that time the property should be re-delivered to Tschirret; that it should be re-delivered to him if the rents were not paid to him; or if statutes of the state or the rules prescribed by the board of health are not complied with; or if liquors are sold in the premises contrary to the law governing the same, etc. And if Tschirret may enter under a forfeiture of the lease, has he not something there, some interest? Did not this agreement contemplate some interest in Tschirret? The term of this lease did not mean merely the time it had to run, but it had some reference also to the estate that was conveyed."

These seem to be all the Ohio authorities, but many cases of both sides have been cited to me from other jurisdictions.

Dunlap v. Bullard, 131 Mass., 161, 162; suit on covenant to pay taxes. Entire term leased, increased rent, with right of

re-entry for breach of covenant. *Held*: A sub-lease and not an assignment. On page 162 the court says:

"It is clear that the parties to this lease intended to create the relation of landlord and tenant between themselves. And it is the duty of the court to give effect to this intention, unless controlled by some positive rule of law.

"To constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in a part of the leased premises which his assignor had therein. He must not only take for the whole of the unexpired time, but he must take the whole estate, or, in other words, the whole term; for, in the language of Blackstone, the word 'term' does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease."

To the same effect are, *Drake v. Lacoc*, 157 Pa. St., 17, 38; *Wheeler v. Hill*, 16 Mo., 329, 334; *Collamer v. Kelley*, 12 Ia., 319, 323; *Jones v. Kansas City*, 99 Mo. App., 433; *Mayhew v. Hardesty*, 8 Md., 479, 495; *Townsend v. Read*, 15 Abb. N. C. (N. Y.), 285.

The New York court seem to have great difficulty in arriving at harmony on this question. The early cases were to the effect that if the lessee demised his whole term, at different rent and with the right of re-entry for breach of covenants, it was a sub-lease and not an assignment. *Post v. Kearney*, 2 N. Y., 394; *Martin v. O'Connor*, 43 Barb., 514; *Collins v. Hasbrouck*, 56 N. Y., 157; *Ganson v. Tift*, 71 N. Y., 48, 54, 55.

But in 1886 (102 N. Y., 601), came the case of *Stewart v. Long Island Railroad Co.*, which plainly and clearly reversed all the prior holdings in New York, though the judge who wrote the opinion attempted to distinguish that case from the earlier decisions. It is to be noted also that there is a very strong dissenting opinion by Judge Finch. If the doctrine as laid down in that case is the law of Ohio, then the making of the ninety-nine year lease from the Commercial Real Estate Company to Brown is an assignment. Nor will the fact that the Commercial Real Estate Company had an option to purchase, nor the fact that they intended to elect to purchase, and that they had the \$90,000 ready to tender on the day named,

avail them if *Stewart v. Railway, supra*, is to be followed, for that case holds that an estate to arise *in futuro* can not be tacked onto the estate of a lessee who has assigned his whole term, so as to create a reversion in him. Rapallo, J., in writing his opinion, frequently uses the term "reversion." That, in order to prevent an assignment, there must be some "reversion left in the lessee." "The lessee must be a reversioner."

Blackstone had stated the rule in *Dunlap v. Bullard, supra*, that if the lessee retain some estate, some interest, then it was an underletting and not an assignment.

In *Fulton v. Stuart, supra*, the court says the second lessee must hold the "whole term" of the lessee; and in *St. Clair v. Williams, supra*, says that the assignee is he who holds the "whole estate or term," while *Jones v. Smith, supra*, says that it must be the "whole term and the whole interest;" and furniture not being conveyed, it was held that the whole interest was not conveyed.

This same language is used in *Worthington v. Ballauf, and Powder v. Neiss, supra*.

The contract in question between Cross, Pack and Vliet was an entire contract relating to two subjects of the law, a lease for fifteen years and an option to purchase on the last day of the term. It was one indenture, one contract and supported by one consideration. If each of the parties to that contract did as he had agreed to do with reference to the option, the defendant should, on the last day of the lease, have had a deed to the premises and would have been the owner of the fee before the lease expired. It is true that, as soon as the defendant had executed the ninety-nine year lease to Brown, on March 10, 1909, the defendant had no reversion left in him, but if the cases of Ohio are properly construed by me, the lessee, the Commercial Real Estate Company, after the execution of the ninety-nine year lease, still had some interest in the premises—they had intended to have. They might re-enter for violation or breach of Brown's covenants. They had a larger rent reserved; a better and more expensive building was provided for; there were different covenants as to insurance, and they had a valid,

1914.]

In re Will of Thompson.

legal, enforceable contract with the owner whereby they could, on the last day of the term, become the owners of the fee.

I am bound to say that this holding is flying in the face of the text-books and many decisions, but the weight of the reasoning, according to my judgment, is that there was no assignment, and the court so holds.

Very able briefs have been presented in this case. The court is fortunate in having had the case so well presented. Every case cited has been in point, and in over three hundred pages of brief I have not found a single wrong quotation.

Finding as I do, it is not necessary for me to discuss Dumper's case, but I desire to say that I trust the law of that case will never be adopted in Ohio.

After a careful reading of the briefs and a consideration of the facts, I find no waiver and no estoppel.

The petition is dismissed, and decree of specific performance on the cross-petition.

INSUFFICIENT EVIDENCE TO ESTABLISH A MISSING WILL.

Probate Court of Franklin County.

IN THE MATTER OF THE ALLEGED SPOILIATED WILL OF MARY L.
THOMPSON, DECEASED.

Decided, July 17, 1914.

Wills—Conditions Under Which a Spoliated Will May be Admitted to Probate—Declarations of Decedent and Her Husband as to Existence of Will—Failure to Establish Contents With Precision.

1. A will being in the custody of a person other than a testator, and not being in existence after death of the latter who was incapable of revoking it, or not having access to it, it must have been fraudulently destroyed in the lifetime of the testator, or subsequent to his death. If so destroyed it was fraudulently so done, and the legal result is the same precisely as if it had continued in existence up to the time of the death of the testator.
2. To establish the contents of a spoliated will upon declarations alone of the testator, without other clear and convincing evidence as to

the precise provisions of the will would be an unsafe rule of evidence.

3. A spoliated will can not be admitted to probate, notwithstanding declarations which sufficiently establish its existence at the time of the death of the testator, if it is impossible to determine its contents by clear and convincing evidence as to its provisions.

Franklin Rubrecht and Louis A. Alcott, for proponents.

Charles J. Pretzman, Thomas H. Bennett, Frank Frebis and Charles E. Nixon, contra.

KINKEAD, J. (acting probate judge).*

This is an application to probate an alleged spoliated will, The testimony offered to prove the making of the will consists of one of the witnesses thereto—the other being deceased—and of quite a number of persons who heard the declarations made by the deceased to the effect that she made a will. The evidence shows that declarations to this effect were made by both the deceased and her husband, that they had both made their wills, and that they had been deposited in the safe of the husband in his law office.

The declarations of Mrs. Thompson clearly show that she had made a will; these, together with the declarations made by the husband, tend to prove that he had also made a will; the evidence also discloses that the wills had been deposited in the safe of the husband; and that, at least, her will had been in his possession up to within two or three days prior to her death.

There is no definite and positive testimony as to the full and precise contents of the will; no witness is produced who either read or heard it read. There is nothing to show the contents of the will except declarations made by the deceased. The real estate was in the name of Mrs. Thompson. It had been acquired by the husband with the exception that seven hundred dollars had been contributed thereto by Mrs. Thompson, which sum she had received from the estate of her parents.

The following are substantially the facts which the evidence tends to prove: Mrs. Thompson stated that *both* had made their

*During illness of the probate judge.

1914.]

In re Will of Thompson.

wills, and that the property was to be divided, half and half, between the two nephews, Bennie Parker on her side, and Dean Weirick on the husband's side. One important item of evidence, the effect of which counsel did not comment upon, was to the effect that on one occasion Mrs. Thompson declared that the wills were both in the safe, but "she knew it would not amount to that" (witness snapping her fingers); that she was afraid to take her will away from her husband's office for fear "he would take his away and destroy it," and that she could not "tell who will go first." Again, she said, "We have got them both fixed for the two boys"; that "Bennie and Dean will both be fixed." In the last illness of the wife the husband declared, "Well, we have got our wills both made and they are up in my office in the safe, but I am not going to give her up yet." Through a period of years Mrs. Thompson made declarations to different persons that she had made her will; that the two had made their wills; that her sister, Mrs. Walcutt, was to get her diamonds, and her nephew and her husband's nephew were to get the real estate in equal shares; that after both of their deaths, the property was to be divided between the two nephews. After the death of Mrs. Thompson, her husband declared that he was not going to give the diamonds to Mrs. Walcutt; that it did not make any difference what his wife wanted; that all they wanted was his money and diamonds; that he was not going to give it to them; that he could not help what they wanted, he was not going to let them have a thing—no money, no diamonds, or anything.

The declarations of both Mrs. Thompson and her husband showed that the latter had custody of the will. The declaration of the husband on Thursday night previous to his wife's death on Sunday, November 30th, 1913, showed that he had custody of her will. It is apparent from her condition and the circumstances that she was unable thereafter to obtain her will, that is, between the time he made the declarations that the will was in his safe and her death on Sunday evening.

Without further review of the testimony, all of it substantially shows the above to be the claims of the proponents of the will.

Two questions are, therefore, presented:

First, was the will destroyed subsequent to the death of the deceased.

Second, have the contents been sufficiently proved.

The statute permitting spoliated wills to be probated explicitly requires that the will must have been unrevoked at the death of the testator, and that it has been lost, spoliated or destroyed since his or her death. Code, Section 10546.

The degree of evidence required to establish both the execution and existence of the will and its contents is that it must be clear, strong, positive, free from bias, and convincing beyond a reasonable doubt. *Cole v. McClure*, 88 O. S., 1.

I am of the opinion that the rule applies to the facts in this case, as contended by counsel for the proponents of the will; that, it being out of the custody of the testator, there is no presumption from failure to find the will that it was destroyed by the deceased.

I think the rule of the case of *Schultz v. Schultz*, 35 N. Y., 653, might properly be applied in this case, because the statute of New York, under which the case was decided, is precisely the same as the one in Ohio as to the existence of the will subsequent to the death of the testator. That is, the will being in the custody of another, if it was not in existence after the death, and the testator was incapable of revoking it, or had not access to it, it must have been fraudulently destroyed in the lifetime of the testator, or subsequent to the death. The fraud in such case is upon the testator by the destruction of her will, so that she will die intestate, when she intended and meant to have her estate disposed of by will, and never evinced any change of that intent. If so destroyed, it was done fraudulently as to her, and, in judgment of law, the legal results are the same precisely as if it had continued in existence up to the time of her death. And it is true that the fact of the existence of the will subsequent to the death can, like any other fact, be established either by presumption or circumstantial evidence, as well as by direct evidence. *Gibson v. Gibson*, 6 C.C.(N.S.), 269.

1914.]

In re Will of Thompson.

It seems entirely probable that if the will was in the safe of the husband on Thursday night prior to the death of the decedent, when he made the declaration that it was there, it was probably destroyed under such circumstances that it might come within the rule above stated, and might well be considered as a will destroyed subsequent to the death of the testator.

The court would be entirely satisfied to admit the will so far as this point is concerned if the contents were established beyond a reasonable doubt and by clear, strong, positive evidence, which was free from bias. The serious and doubtful question is as to the contents of the will. If there is a reasonable doubt as to this matter, it can not be admitted to probate.

The question whether or no the declarations of a decedent or testator are alone sufficient to prove the contents of a will is an important one which does not seem to have been considered by the courts to a very great extent. And some of the cases are not very satisfactory, because they do not go into the reason and logic of the question. Of the decisions cited by the texts upon wills, *Schnee v. Schnee*, 61 Kan., 643, seems to be the only one clearly maintaining the view that such declarations alone may be sufficient.

McDonald v. McDonald, 142 Ind., 55, when carefully read and considered, does not squarely decide the question.

Other adjudications support the view that evidence of the declarations of the testator is admissible to *corroborate* the testimony as to execution and contents of a will. *Lane v. Hill*, 68 N. H., 275.

Other well considered cases are to the effect that such declarations are not alone sufficient to prove the contents of a lost will. (*Mercer v. Macklin*, 14 Bush. (Ky.), 434; *Clark v. Morton*, 5 Rawle (Pa.), 23; *Clark v. Turner*, 50 Neb., 290.) The latter case is a very carefully considered one.

The uncertainty and doubt cast upon the question of the contents of this will by the declarations of the deceased and her husband, all considered together, furnish illustration of the dangers incident to the adoption of such a rule, especially when it will operate to destroy the effect of statutory provisions relat-

ing to the making and probate of wills. It is a general fundamental rule of evidence that declarations of persons are always to be received by the triers of facts with caution, for the reason that they may not have been perfectly understood, they may not have been accurately repeated, so that the full effect of all that may have been stated by the declarant may be reproduced. And this rule should be especially observed in a case like this.

As was well stated in the case of *Chisholm v. Ben*, 7 B. Mon., Ky., 408:

"It is better that occasional injustice should be done in exceptional cases upon failure of legal proof, than that transactions within the statute should in all cases be left to the uncertainties of parole evidence. So the courts in giving effect to the statutes should pursue the same policy, and should avoid meeting hard cases by adopting rules which, generally applied, would defeat the objects of the Legislature."

I think that we would not have so much difficulty in establishing the will upon the sole declarations of the two deceased persons in this case, provided such evidence is to be properly considered, were it not for the other fact which stands out so boldly in the evidence that there must have been some kind of a condition in the will of the deceased wife and in any understanding that may have existed between her and her husband as to the final disposition of the real estate. This one matter raises a reasonable doubt in the mind of the court as to what the contents of the will were. The declarations of the deceased, in whose name the real estate stood, indicate that she and her husband might have entered into a mutual compact to make what might be termed mutual wills, so as to finally dispose of the property upon the death of both of them in a way that had been agreed upon between the two parties; that is, it would seem from her declarations that there must have been some understanding and agreement between the two that the will of Mrs. Thompson was made in such way in favor of her husband that it left the final disposition of the real estate to be made by the will of the husband so as to carry out their mutual purpose and understanding to devise the real estate on the death of both of them in two

1914.]

In re Will of Thompson.

equal parts, one-half to her nephew and one-half to his nephew.

If the declarations of the two parties were all to the effect that the wife only had made a will, and that it was in the safe, and that its provisions were such that the real estate was to be divided equally upon the death of both of them to the two nephews, and the diamonds were to go to her sister, and that the real estate was to go to her husband for life, there should not be much question as to the contents of the will, if we have a right to rely upon declarations of the deceased for the purpose of establishing the contents of the will. But it will be remembered by parties in interest that none of the declarations contained any reference or statement relative to the fact as to whether or not Mrs. Thompson's will contained the provision that the real estate was to go to the husband either for life or in fee. It all has reference to the disposition upon the death of the husband to the two nephews, and is silent upon the other point. The real estate being in the name of the wife, it was entirely within her sole power to devise it to her husband for life, and to the nephews upon his death. But her fear, as clearly shown by her declarations that her husband would not carry out their purpose in the making of their wills, indicates that she must have devised the realty to her husband in such way as to leave the final disposition of it entirely within his power, and in reliance upon his promise, and possibly upon a will made by him, that upon his death, it would go to the two nephews. It seems that no other rational conclusion could be arrived at than this, and that she must have left it entirely within the power of her husband to carry out the mutual purpose to make final disposition of the realty to the two nephews. There would have been no other purpose or object in making the two wills, or what might be called mutual wills. They could not have made a joint will, because the wife only was possessed of the property. *Walker v. Walker*, 14 O. S., 157.

And, not being tenants in common, they could not have made a joint will. *Betts v. Harper*, 39 O. S., 639.

If the two had made a mutual compact to dispose of the property by separate wills, the wife devising it in fee to the husband,

with the understanding that he would devise the fee by his will upon his death, by his separate will, such compact and such wills could not be made effective by admitting the will of the wife to probate under the circumstances of this case.

Because of this doubt which arises from Mrs. Thompson's declarations, the court is of the opinion that the declarations of both Mr. and Mrs. Thompson, under the circumstances of this case, are wholly inadequate to enable the court to arrive at any definite conclusion as to the exact contents of the will of the deceased wife. It would be a dangerous precedent to establish the will under the evidence offered in this case. The court is not justified under the evidence in changing the course of descent, or in ignoring the statutory provisions relative to the making of a will, and in admitting the same to probate. It is the opinion of the court that it would be an unsafe rule to establish a will upon the declarations of the deceased as shown by the evidence, without other clear and convincing evidence as to the precise provisions of the will.

The application to probate the will as a spoliated one under the statute is, therefore, overruled, and probate thereof is refused.

1914.]

Schwartz v. Telephone Co.

**LIABILITY FOR INJURY TO A TELEPHONE LINEMAN
FROM A FALL.**

Common Pleas Court of Franklin County.

**THOMAS J. SCHWARTZ v. THE COLUMBUS CITIZENS TELEPHONE
COMPANY.**

Decided, March, 1914.

Custom—As to Inspection of Conditions Under Which Work is to be Done—Not Admissible in Evidence, When—Excessive Damages—Duty of the Court Where the Evidence and Charge are Disregarded in Fixing the Amount—Damages Distinguished from Injuries—Compensation Not Restitution.

1. Where a telephone company has been deprived of the defenses of assumed risk and contributory negligence through its failure to pay into the state insurance fund, and one of its linemen brings an action for injuries caused by the fall of a pole that he had climbed in the course of his employment and which was rotten at the ground, evidence will be excluded as to a custom which cast upon the lineman rather than upon the company the duty of inspecting poles with respect to their condition; and in such a case the jury will be instructed that the company is specifically charged with the legal responsibility resulting from its alleged knowledge as to the defective condition of the pole.
2. Failure of the jury to follow the evidence and the instructions of the court touching the damage suffered by plaintiff is ground upon which a trial judge may set the verdict aside; and where a verdict has been returned of \$5,000 for injuries to a telephone lineman from a fall, resulting in nervous shock and his being in a hospital for one week and remaining idle (though perhaps through mistaken advice) for a year and a half, a new trial should be granted unless the plaintiff consents to accept a remittitur of \$2,500.

Gumble & Gumble, for plaintiff.

Daugherty, Todd & Rarey, contra.

KINKEAD, J.

This case was brought for personal injury resulting from a fall from the top of a telephone pole upon which plaintiff had climbed to do some work by direction of the company. The

pole was decayed or rotten at the ground and the weight of plaintiff caused it to break precipitating him to the ground causing injury. The amount claimed was \$10,125, the verdict being for \$5,000.

The motion for new trial assigns error in the charge of the court, and excessive damages.

The defendant not having complied with the workmen's compensation act, it was deprived of the common law defenses of assumption of risk and contributory negligence.

Because of what appears to be a custom among telephone and telegraph companies, concerning the obligation or duty of observing and inspecting poles used by such companies before servants thereof shall climb them to make repairs in their lines, an interesting question was presented under the statute which takes away the defense of assumption of risks.

Evidence was offered at trial by defendant tending to show that the custom among such companies, and the regulation of the defendant company, was such that no general inspection was ever made of the poles, but that each workman was to do his own inspection by observing whether the poles were safe before climbing them.

Such a rule would cast a duty upon the servant which primarily rests upon the master. It had the effect of compelling the servant by implied contract to assume the risks incident to the obligation which the terms and conditions of the employment cast upon the servant.

To apply such a rule to the contract of employment in this case, would not only relieve the defendant from all duty and obligation whatsoever, but it would be in direct contravention of the statute which deprives the defendant of the claim of defense of assumption of risk. Hence the evidence as to usage was not permitted and the court in its instructions to the jury specifically charged the defendant with the legal responsibility which resulted from alleged knowledge of the defective condition of the pole and a failure on its part removes the same.

In argument of the motion for new trial it was claimed that the court interpreted too narrowly the terms of the statute,

1914.]

Schwarz v. Telephone Co.

“wrongful act, neglect or default,” as if it was meant to restrict the common law rule of liability.

In respect to such claim it is to be observed that the interpretation of Pugh, J., of the Superior Court of Cincinnati, *Schaefer v. C. B. Co.*, 13 N.P.(N.S.), 553, was rejected, and that of *Gerthung v. S. T. Co.*, 18 C.C.(N.S.), 496, was followed, although we had not the benefit of the latter decision at trial.

The rule adopted in the charge did not enlarge the basis of the common law rule, but instead enforced such rule of liability. It was specifically stated that “these terms (wrongful act, etc.) mean any failure or neglect to perform a duty required by law of defendant, owing by it to its employees or servants. A wrongful act denotes or embraces all acts which are wrong or in violation of a duty imposed by law which inflicted an injury. Neglect and default mean neglect, omission or failure.”

“The wrongful act charged in this case is that the pole from which plaintiff fell broke at the surface of the earth, at which place it was of insufficient strength to hold plaintiff while he was at the top thereof.

“The further charge is that defendant *had knowledge of the insecure and rotten condition of the pole at the time the plaintiff was ordered to climb the same.*”

The evidence clearly showed that such knowledge was conveyed to an employee of the company.

The statute, Section 1465-60, makes the defendant liable for any neglect or default of any of the employers, officers, agents or employees. The jury was instructed that:

“It was the duty of the foreman, if knowledge of the defective condition of the pole was made known to him, within a reasonable time to have reported such condition of the pole to the defendant, its officers and agents; and if such report was made to the defendant or any of its officers or agents, it was then the duty of the defendant, within a reasonable time to have removed the pole, and in its place put one that was safe and secure.”

The question of fact, with proper instructions, was properly submitted to the jury. And the verdict of the jury is sustained by fact and law.

The serious problem is as to the damages. Are they excessive?

Courts should be careful to keep within its power in matters of this kind. A new trial may be granted for "excessive damages, appearing to have been given under the influence of passion or prejudice" (Code, Section 11576), or when "the verdict is not sustained by sufficient evidence."

This injury occurred June 5, 1912. The action was filed November 7, 1912. Verdict was rendered February 12, 1914.

Plaintiff was in the hospital one week. He returned to the hospital for an examination six months after that. Such an injury, Dr. Brock states, would cause "more or less nervous shock"; that until the person would overcome such shock, he would have trouble in sleeping. Such injury, he says, would not necessarily result in pain in the back of the head, although it might. He states that, though it is possible, a resulting nervous shock from a fall would not ordinarily last so long as a year and a half after the fall. Absolute quietness, he says, is the cure for the trouble.

Dr. Brock describes the injury as a sprain in the back as stated to him by the patient, stating "his main injury we *felt* was in the sacro-iliac joint; that is the joint where the backbone and the pelvic bones join, what is called the sacro-iliac joint; that is, a sprain of that joint, and also of some of the lumbar muscles in the back, but no fractures of any kind that we could find."

Dr. Brock stated that with quiet and rest, and some support to the back in some way either by strapping or some sort of a jacket to the back, the party would have a positive cure from an injury like this; that it would ordinarily take several weeks for a cure.

Dr. Lippett states that plaintiff consulted him about March 15th to 20th, 1913; that he complained of considerable pain and nervousness; that on examination he was tender to the touch in the region of the spine on the left. This doctor said "from his symptoms, and the way he walked, and the nervousness, I thought that the nervous system was shocked, possibly the spine was injured." He expresses the opinion that he did "not believe that he will ever be the man he was before the accident.

1914.]

Schwartz v. Telephone Co.

He was a big strong man." Dr. Lippett wrote a letter to an officer of the company August 31, 1912, in which he stated that there was no visible sign of injury, swelling or inflammation, but he complains of severe pain in low portion of spinal cord, great nervousness, and insomnia, but that he was improving and will ultimately recover.

Dr. Howell who made an examination of plaintiff during trial testified that he made an examination of his spinal column to see if there was any abnormal curves in it; there were none; the tension of the muscles on both sides of the column were the same; he complained of no pain until the point, the sacro-iliac articulation, was reached, that is where the spinal column joins the pelvis; at that point he complained of pain.

Dr. Howell then made an examination of plaintiff, with a view to the condition of his nervous system.

"The head and face—we made him move the different muscles of his face, tongue and muscles of expression, to ascertain if the cranial nerves, that is, the nerves originating in the brain, if they were functioning normally. They were. One side of the face would pucker up; he could use one side of the face just as well as the other, so that both cranial nerves, the right and left * * * were functioning normally. Putting out his tongue, came out promptly, straight, not to one side or the other, and there wasn't any tremor to the tongue. * * * There are indications that the cranial nerves were in normal condition. The upper extremities were then examined, as flexion, extension, and prehension, * * * that is the grasp that one has in his hands, as in shaking hands or lifting something, normally. The thorax or chest was examined as to the condition of his heart and lungs, and were both normal. The next was the abdomen; that was examined to see if there was any abnormal enlargement of the liver, displacement of the kidneys. * * * The liver as of normal size, kidneys in normal position; the intestinal tract was soft; the abdominal wall was soft, showing that everything within was in a normal state. * * * I then examined his lower extremities, * * * from the hips down. All the functions of the lower extremities were carried on in a normal manner. The spinal column was examined, * * * the normal curves were present. There was no pain in the back save and except at the point * * * of the sacro-iliac articulation. * * * In order to test the flexibil-

ity of the spine, * * * to see if it was flexible, * * * and could be moved in different manners, I placed a pocket knife on the floor and asked him to stoop over and pick it up, which he did. So that the elasticity and flexibility of the spinal column are in normal condition. * * * In diseases of the spinal cord or in organic conditions of the spinal column, the patient does not bend forward in picking up a knife, for instance, * * * he wont flex the back at all, he just bends his knees to get it.

"Nervous system: The patellar reflex was normal. By patellar reflex we mean that, with the patient's limb crossed, * * * if you hit the knee right below the kneecap you have that motion (that is kicking); you can not help it; in a normal person, that is always present; * * * because a reflex takes place. That was normal in this case. In diseases of the spine, that patellar reflex is lost. Ankle clonus was absent, which is normal. * * * (Explanations omitted.) I then tested the different paths that led from the extremities of the brain, the different spinal paths. There is a path for heat and cold (omitting explanations) showing that the paths of conduction between the extremities and the head were in a normal condition. Tactile touch was normal. * * * If you take a feather or a fine piece of paper, and scratch over the part, if the patient feels that, it is known as tactile touch, or if you feel something in your hand, they can sell the shape of it; that is tactile touch. * * * Cornig's sign was absent, which is normal. In diseases of the spine, Cornig's sign is present."

Dr. Howell thereupon expressed the opinion that if there had been some sprain or wrenching of the cartilages connecting the sacro-iliac articulation, plaintiff had recovered from it.

Besides the testimony of the physicians we have that of the plaintiff himself, whose complaint since the time of leaving the hospital is that he has had pain, that he has spent sleepless nights, and that he is nervous. The claim is that he suffered injury to "his spine and other internal injuries," that his "physical and nervous condition" is impaired to such an extent that he has been unable to work. And he has not worked for a year and eight months and more.

Then what does the evidence show his probable damage to be?

A breach of duty and *damages* are the essential elements of a right to or cause for action for negligence.

1914.]

Schwartz v. Telephone Co.

Damage is a technical term distinguishable from *injury*, which is the gist of a right of action. While violation of duty, or the wrongful acts showing violation, is an essential of a cause of action the loss, detriment, harm to the person constituting damage to the person is equally an essential element of a cause of action for negligence. To constitute damage in personal injury there must be an *impact* resulting in loss, detriment to the person, causing physical suffering, sickness, pain, loss of time and power to work.

Ordinary damages are a sum awarded as a fair measure of compensation to the plaintiff, the amount being, as near as can be estimated, that by which he is the worse for the defendant's wrongdoing. Compensation, not restitution, is the proper test. It is not possible to lay down a universal rule for ascertaining the amount, the causes and circumstances of actionable damage being infinitely various. Money can never actually compensate one for personal injury accurately. The most the law aims to do is to give some just compensation for the damages suffered.

In the assessment of the damage there should not be any speculation, or "passion or prejudice."

The jury must follow the rule of law or the measure of damages given it in the charge of the court, and the evidence. The court instructed the jury to award plaintiff such damages by way of compensation for the injury by him sustained, including pain, if any; and for time actually lost on account of the injury. The jury was instructed to "be governed by the evidence and determine therefrom the nature and extent of the injury claimed. "You should not speculate or act upon conjecture not based upon the evidence."

The jury evidently did not follow the evidence nor the instructions of the court in the assessment of damages. And it becomes the duty of the court now to carefully consider the question of damages with a view to doing as nearly exact justice to both parties as may reasonably be done.

It has seemed that courts have not always been specially attentive to the duty in the matter of the amount of damages allowed in this class of cases. It is an important duty and is to

be carefully and cautiously performed. The court must be careful not to be partial to either the defendant nor the one who has suffered the injury. The law of compensation must be just and impartial. If the jury makes a mistake, the court must endeavor to correct it.

The amount of recovery in cases like this is often the dominant thing, yet more frequently receives the least attention of counsel and the courts. It has been suggested by a recent opinion that the discredit of the system of the administration of justice in matters of this nature has been "in failure to impress upon juries the true logic of recoverable loss, and giving too much heed to unbridled arbitrary awards under lingering influence of the perversion that the court is practically helpless where the award is not characterized by passion or prejudice." *Buck v. Bremery Co.*, 148 Wis., 222; 134 N. W., 914; Ann. Cas., 1913 A. 1357, Marshall, J., dissenting.

When a court explores the evidence in the case to determine whether the verdict "appears to have been given under the influence of passion or prejudice," it is often like soaring in the field of metaphysics. But if we seek to determine whether the verdict for the amount awarded is excessive because it is not sustained by sufficient evidence we tread on safer ground.

The opinion in the above cited case by Marshall, J., recites some interesting considerations which he is of opinion should enter into the matter of assessment of damages. While we may not coincide with all he states, still his observations are of such interest that the same are here reproduced:

"In view of my oft expressed opinion respecting the ethical right of every employee to just compensation for inadvertent bodily injuries received in the course of his employment, regardless of the source of fault, it can not be thought I am keenly sensible to human suffering in such cases. But one must hold to legal, just practical standards. * * *

"I repeat what I have urged before, personal injury losses in service, necessarily, must enter into the cost of production to be paid, ultimately by the consumer, according to an economic law as certain in its operation as in nature, there is no escape from it. Invisible and unappreciable as it is, as much as the

1914.]

Schwartz v. Telephone Co.

forces which control the planets, the ultimate point of rest of all such losses is the body of the products entering consumption. Humanity as well as conservation of human resources and welfare, require this truth to be appreciated, as I have taken the liberty, several times, of suggesting. *Monaghan v. Fuel Co.*, 140 Wis., 457; *Hong v. Lumber Co.*, 144 Wis., 337; *Knudsen v. Stone Co.*, 145 Wis., 394 (33 L. R. A. [N.S.], 223).

"However, the idea of compensation, whether vitalized by common law rule or written law or left to rest in mere ethical standards, springs from one's sense of justice under all the circumstances, keeping in mind that full compensation is impossible, the attempt to effect it destructive, and that those who furnish opportunity for employment as well as the employed are to be considered in dealing with the matters which are the inevitable incidents of industry, the common misfortune and common burden. True logic in the field under discussion is stated in *Guinard v. Knapp-Stout & Co.*, 95 Wis., 482, and often approved here:

" 'Although the defendant may have committed a fault, it is not, for that reason, an outlaw nor beyond the care of the law. Society may still receive valuable service from it, and so is interested to preserve it against spoliation, by applying to plaintiff's recovery a proper limit of compensation. It could not advance the interests of society to impoverish and bankrupt the unfortunate defendant. * * * Absolute indemnity is impossible. The most (the law) aims to do * * * is to give some just compensation for the damages suffered.' "

"To go further in an effort to repair a personal injury loss than as above indicated, would establish a new rule, productive of waste, which legislatures * * * have been striving to prevent. Exorbitant recoveries encourage litigation, demoralize the profession, discourage industry, prejudice general welfare, and bring down criticism upon the courts as inefficient to maintain a practicable standard of justice. Just compensation to the injured is a legitimate part of created things; and excess with its large public and private incidental expense, constitutes waste, abnormally increasing the price of consumable things, decreasing industrial activity and opportunity for labor, bearing down wages and up the cost of worthwhile existence. From any viewpoint, courts should co-operate with the law making power to make recoveries certain and economical, where there is a right to recover, but always within reasonable limits."

Giving attention to the evidence in this case for the purpose of showing that the verdict is not sustained by sufficient evidence, it

is clear from plaintiff's own witnesses, especially the doctors, that the injury consisted of a severe impact by the fall, which, according to Dr. Brock, would by rest and quiet mend in "several weeks."

Aside from the substantial testimony as to the fall and of the doctors, is the complaints of the plaintiff himself, which are to be construed as an injury to his nervous system. There is also the expression of pain when he was examined by Dr. Howell.

It seems entirely clear that there could not have been a serious injury to the nervous system of plaintiff from the shock resulting from the fall which could not have been cured by "several weeks" rest. At the time of the examination by Dr. Howell plaintiff's condition was normal. Exercise is the most valuable aid to a shock to the nervous system either to the brain worker or to the manual worker. It will keep the system in order. Whatever tends to produce a healthy body also tends to maintain a good condition in the nervous system. For one, who had been as active as plaintiff prior to his injury, to absolutely cease his active efforts, and to give himself up to the idea that he must not exercise by performing any kind of labor, seems the worst thing that could have happened to him. Nerve cells consume food by continued activity, as they also do by rest. But there is a marked distinction between a nervous shock to one like plaintiff whose active life had been climbing telephone poles, and a brain worker of sedantary habits. If the nervous system of the latter is shocked by over and continuous mental exertion, rest and continuous rest may be the best restorer. But in the shock such as plaintiff experienced after "several weeks" quiet and rest, as Dr. Brock states, he should be recovered from his nervous shock, after which he should not continue to neglect his muscular activity, dwelling upon his past injury and his right of action against the one legally responsible therefor.

Plaintiff should not have lost more than two or three months, after which he was able and should have gone at some kind of work. He would have been better off. The testimony of his own witnesses and of Dr. Howell shows this.

While the amount of the damages is for the jury, if the amount awardable is not in accord with the evidence, a motion for new

1914.]

Schwartz v. Telephone Co.

trial because the verdict is not sustained by sufficient evidence should be sustained, which is accordingly done.

In *Pilling v. Benson* (R. I.), 84 Atl., 1005, man thrown from wagon in collision with automobile, the verdict was \$4,000. Well within few months; verdict reduced to \$1,000.

In *Walsh v. Peoria R. Co.*, 15 Ill. App., 453, chauffeur injured in collision with street car; loss of time five months; verdict \$2,225. Reduced to \$1,625.

Watkins v. Chicago, 146 Ill. App., 552, young woman fell on sidewalk; injury to back, ankle and leg producing serious shock and impairment of health. Sustained. Verdict was for \$...., reduced to \$....

In *Pfeiffer v. Radke*, 144 Wis., 430, woman thrown from buggy in runaway; also personal injury to back; verdict for \$1,500; reduced to \$800.

In *O'Flanagan v. R. R. Co.*, 145 Mo. App., 276, switchman had bad fall, broken ribs, bruises and sprains; principal affliction traumatic neurasthania. Verdict of \$5,000, reduced to \$3,000.

In *Redden v. R. R. Co.*, 79 N. J. L., 3, woman fell in alighting from street car. Verdict of \$3,500, reduced to \$2,500.

In *Blado v. Draper*, 89 Neb., 787, woman; collision between carriage and automobile, injury not stated; verdict for \$3,000, reduced to \$2,000. Cases found in note Ann. Cas. 1912 A., p. 1361.

Though it seems that plaintiff was not justified in remaining idle as long as he did, still he did so because he received this injury, and lost his earning during this period, though perhaps largely on account of mistaken suppositions concerning his condition.

If plaintiff will consent to a remittitur of \$2,500 the motion for new trial will be overruled; otherwise it will be sustained.

PERMISSION TO ERECT BOOTHS IN A PUBLIC PARK.

Common Pleas Court of Franklin County.

THE CITY OF COLUMBUS v. M. B. BIEDERMAN.

Decided, July, 1914.

Municipal Corporations—Authority in Council to Supervise and Control Parks—Vesting Management in a Director of Public Service Does Not Confer Power to Grant Privileges.

1. The term public grounds as used in the statutes referring to the powers of council necessarily includes parks which are open to the public.
2. Authority in a director of public service to manage the public parks does not include authority to grant permission to private parties, for a stipulated rental to be paid to the city, to erect booths for the sale of refreshments and articles likely to be called for by visitors to the park. If such authority is to be granted it must be through proper legislation by council.

Henry L. Scarlett, City Solicitor, and Wilbur E. Benoy, Assistant City Solicitor, for plaintiff.

Stuart R. Bolin, contra.

ROGERS, J.

The case is heard on plaintiff's application for a temporary injunction. It appears from the petition and affidavits filed in support of the motion, that S. A. Kinnear, the director of public service of the plaintiff, on May 1, 1914, granted permission to defendant to construct, maintain and operate at her own expense a booth on city property known as Schiller Park, one of the public parks belonging to said city and within its corporate limits, for the purpose of selling soft drinks, popcorn, peanuts, candies, etc., for the convenience of visitors to said park during the seasons of 1914 and 1915; that said permission was granted with the distinct understanding that the booth was to be vacated and removed at any time upon ten days' notice from the superintendent of the park; that the consideration therefor was the sum of \$8 per month, payable by defendant on or before the 10th day of each month, to said superintendent, and by him turned over to the city auditor and placed to the credit of public service

1914.]

Columbus v. Biederman.

4-X fund; that defendant, in pursuance of said grant, is operating and maintaining said booth within the park for the aforesaid purpose; that no authority was conferred by the city or city council thereof upon said director to grant said permission to the defendant and the same was done without authority of law; that on May 18, 1914, by resolution of the city council, duly adopted, wherein it recites that the refreshment stand was being maintained without any authority from it, it ordered the solicitor to cause the removal of said stand from the park by legal proceedings, if the director who is ordered to remove it did not do so within ten days after the adoption of the resolution. The plaintiff prays for an injunction restraining the defendant from making further sales and requiring her to vacate the premises and remove the booth therefrom.

The question is raised as to who has the power or authority to grant the permission in question. If the director, without authority from the city, through its council, had the exclusive authority to grant the permission, the grant is valid and defendant is lawfully in possession thereunder, and the action of council is not necessary to the grant nor can council revoke or terminate the grant to defendant by its action. On the other hand, if the power is not vested in the director to grant the privilege, either by authorization of the municipality by its council or by statute, the rights of defendant under the unauthorized grant which was an abuse of corporate power by the director, are nil, and the plaintiff under favor of Section 4311, General Code, is entitled to an injunction against defendant to restrain the execution or performance of the contract made with her in behalf of the corporation as a contract "in contravention of the laws or ordinances governing it."

Section 3714, General Code, relative to the supervision and control of public property of the municipality declares:

"The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the corporation, and shall cause them to be kept open, in repair, and free from nuisance."

The term "public grounds" as used in the statute necessarily includes parks which are open to the public. This being so,

the statutory language necessarily included Schiller Park, which is shown to be a public park, and, therefore, is a part of the "public grounds" within the corporation. I have no difficulty in arriving at the conclusion that Schiller Park is a part of the public grounds, of which, within the meaning of the statute above quoted, "the council shall have the care, supervision and control." Whether such care, supervision and control shall be exercised by such legislation relative to each park, or by legislation applied to all parks, is not important in this case. According to my construction of this section the care, supervision and control of the public parks within the city as part of the public grounds herein is vested in the council, and the means to effect that end is not before us.

Section 4324, General Code, relative to some of the duties of the director of public service declares:

"The director of public service shall manage municipal water, lighting, heating, power, garbage, and other undertakings of the city *parks*, baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants, and farms," etc.

Does the duty imposed upon the director to manage, among other things, "*parks*," include the power to grant privileges to the defendant, for a consideration, payable to the city, to construct and operate a booth in Schiller Park for the two seasons of 1914 and 1915, subject to termination and discontinuance upon ten days' notice by the superintendent? I think not, unless the council has by proper legislation conferred upon the director such power. The care, control and supervision of public grounds within the corporation is vested in the council, and the management is vested in the director, under the direction of council, which is the superior authority. The management of the thing depends upon the thing to be managed. The management of a market house, or garbage plant means a different thing from the management of a public park. In the case of a market house, management may consist in renting stalls, collecting rents, etc.; or in the case of a garbage plant the management may consist in gathering the garbage, disposal of the product and the like. In the case of a public park, however, its management

1914.]

Columbus v. Blederman.

may consist in keeping the park in order, beautifying it, etc. The matter of letting out privileges for private gain is not within the term management of a park, unless such authority is conferred upon the director by the superior authority vested in the council which is the care, control and supervision of "public grounds" within the city. There being no such authority conferred upon the director by council, the director has no authority under the power conferred upon him to manage the park. The management of the park does not include letting out privileges therein to private individuals. For that is no part of the uses to which the park can be put, unless conferred upon him by his superior, to-wit, the council.

The principle involved in *Cincinnati v. University*, 13 Dec., 284, is applicable here. If the director, in addition to the things granted, had granted a privilege to defendant to build a fence around her booth for her private use, we would have the case of *Cincinnati v. University*. He did grant the privilege to defendant to construct the booth, just how large is not shown, occupying part of the ground of the park to the exclusion of others and for the defendant's private use. I can see no difference in the principle between the fence and the booth. They both are intended to exclude the public from that portion of the park embraced within the fence and within the walls of the booth respectively. In the *Cincinnati* case the court held in the second paragraph of the syllabus as follows:

"The authority of the board of public service over park property is not limited to the improvement, care and control of said park, and inasmuch as a permit from this board to the university to build a fence around its athletic field for the purpose of excluding the public therefrom is in effect a conveyance by the board to the university of that part of the land embraced within the fence, such a permit is beyond the powers conferred on said board by the statute."

The citations from the New York cases are not pertinent because the statutes in Ohio differ from those in New York. Furthermore, the contention that there is no irreparable injuries shown is not sound. The statute confers the remedial right of injunction, independent of irreparable injury, to restrain the

exclusion or performance of a contract made in behalf of a corporation in contravention of the laws or ordinances governing the city. Irreparable injury and want of adequate remedy at law are not necessary elements in the case. That the execution or performance of the contract is in contravention of the laws or ordinances governing the city are the essential facts to warrant injunction.

I am satisfied that the director not only exceeded his authority but that he had no authority to grant the privilege in question. If such privileges are grantable at all, they must be effected through proper legislation of council having the care, control and supervision of the public grounds of the city which include its public parks. I do not mean to say that council can contract directly with individuals, but it can provide how booths and concessions in parks may be let out, including the number, and the regulation therefor, and also provide the method of granting such privileges; and the administrative officer will merely execute the orders of council in that behalf.

That the director or others are violating the statute in other instances is no argument for the violation in this case. Nor am I able to comprehend how the light extender ordinance is pertinent to the case.

It is not important whether the agreement in question is termed a license or a lease. There is no occasion to classify the document under any head. It is sufficient to show that the director has attempted to grant a right to the defendant in the park which the director has no power to execute.

The case does not fall within those cases relative to the exercise of discretion by the director. The director may exercise discretion in the management of the park, but in this case before us there is an entire want of authority to do what he attempted and his acts were therefore void, and the pretended rights of the defendant by virtue of their agreement are void and in contravention of law.

Being of opinion that the injunction ought to be allowed as prayed for, the same is so ordered. Bond fixed at \$500. Exceptions.

1914.]

State, ex rel, v. Keefer et al.

MUNICIPAL POSITIONS HELD DE JURE UNDER TEMPORARY APPOINTMENT.

Superior Court of Cincinnati.

STATE OF OHIO, EX REL JAMES J. FITZGERALD, v. EDWARD S. KEEFER, JOHN J. WEITZEL AND ANDREW H. FOPPE, BEING
AND CONSTITUTING THE CIVIL SERVICE COMMISSION OF THE CITY OF CINCINNATI.

Decided, August, 1914.

Civil Service—Tenure of a Temporary Appointee by the Mayor—Rule Limiting to Three Months Inconsistent with Statutory Provisions—Mandatory Writ Will Issue to Certify Such an Appointee on the Pay-Roll, When.

1. In the absence of an eligible list applicable to a position in the classified service of a municipality, one appointed by the mayor temporarily to fill such position by virtue of General Code, Section 4488 (P. & A., 1912), is entitled to hold such position and receive pay therefor until an eligible list for the position is created by the civil service commission as the result of competitive examination.
2. A rule adopted by a municipal civil service commission providing that temporary appointments by the mayor to positions in the classified service shall not continue more than three months, is inconsistent with Section 4488 (P. & A., 1912), and is an attempted exercise of legislative power by an administrative board, and therefore void.
3. A temporary appointee, appointed prior to January 1st, 1914, holding a position in the classified service for a period longer than that provided by an attempted regulation of the civil service commission, is entitled, nevertheless, to have his name certified by the civil service commission in connection with the pay-roll of his department as "appointed" or "being employed," under the provisions of Section 21 of the civil service act of April 28th, 1913, and a mandatory writ will issue to the civil service commission to so certify.

NOTE—References above made to the General Code are to the Page & Adams Annotated Edition of 1912, prior to the enactment of the civil service law of April 28, 1913.

Moulinier, Bettman & Hunt, for the relator.

Charles A. Groom, Assistant City Solicitor, contra.

MERRELL, J.

This is an action in mandamus wherein the relator, who has been serving as valveman in the water works department of the city of Cincinnati, seeks to compel the defendants, the civil service commission of Cincinnati, to certify, in connection with the pay-roll of the water works department, that the relator was appointed and is being employed in pursuance of the act of April 28, 1913, relating to the civil service of the state of Ohio. The civil service commission has refused so to certify the pay-roll, containing relator's name, for the week ending August 7, 1914, claiming that the relator was not legally appointed to his position as valveman, and that even if legally appointed his right to hold that position has terminated under the statutes of the state pertaining to civil service and the regulations of the Cincinnati civil service commission. In the absence of such certification, the relator, under the provisions of Section 15 of the act of April 28, 1913, can not draw pay for the period mentioned or any subsequent period. On the pleadings in the case, it is admitted that relator's position is in the classified service of the city of Cincinnati, the compensation therefor being \$2.50 a day, or \$17.50 per week.

The answer of the commission is, in substance, a general denial, following which it is alleged that the relator, on February 24, 1913, was appointed by the mayor of the city without having taken a competitive examination for the position, and that he was not appointed from an eligible list prepared by the civil service commission and that the mayor of the city failed to secure or procure the authority of the civil service commission to make such temporary appointment. It is further alleged that there existed at the time no extraordinary exigency for such appointment, nor was the same necessary to prevent the stoppage of public business. The answer further sets forth Rule 73 of the civil service commission of Cincinnati, hereinafter quoted, and alleges that the relator has served more than three months,

1914.]

State, ex rel, v. Keefer et al.

which by said Rule 73 is made the maximum tenure of a temporary appointee.

At the trial the relator put in evidence a letter of March 7, 1913, as follows:

“To Honorable Civil Service Commission:

“From H. T. Hunt, Mayor.

“Subject: Temporary appointments.

“In the absence of an eligible list the following men have been appointed to the positions mentioned:

“Jas. J. Fitzgerald, valveman, \$2.50 per day, effective February 24.
(Signed) HENRY T. HUNT, Mayor.”

This letter was received by the civil service commission on or about its date.

There was further put in evidence the official roster kept by the civil service commission of city employees, wherein appears the name of the relator, his position as valvemen, the amount of his salary and the date of his appointment. This roster is entitled “Official Register of Employees,” and is the record required to be kept by the provisions of Code (P. & A.), 4483. It also appeared that the relator has never taken an examination, either competitive or non-competitive, for the position of valveman; that he has never been afforded an opportunity to take such examination, and that no examination, competitive or non-competitive, for the position had ever been held.

At the conclusion of relator's proof a motion to dismiss the case was interposed and overruled *pro forma*. The motion was based upon the contention that the relator had failed to establish a *prima facie* case, first, in that there was no proof that his appointment by the mayor was to meet an extraordinary exigency or to prevent a stoppage of public business as provided by Code, Section 4488, relating to temporary appointments by the mayor; and, second, that there was no proof of a notification to the civil service commission of a vacancy in the position of valveman, as provided for in Code, Section 4481, relating to the manner of making appointments in the classified service.

As this motion lies at the threshold of the case, the grounds therefor will be considered before any discussion of the merits.

1. If the facts of public necessity for relator's appointment, that is to say, extraordinary exigency or impending stoppage of public business must be affirmatively proved, the relator after eighteen months must establish all the conditions of the public service at the time of his appointment, and the good faith of the then mayor must be inquired into on the score of whether at the time of this appointment there was impending an extraordinary exigency or a stoppage of public business. Manifestly this is a burden almost impossible to sustain by one in relator's position. If such a rule were established, no employee in the public service would hold his position in security unless prepared at all times to submit to judicial inquiry the history of his appointment to office. His pay might at any time be stopped with impunity unless he were prepared at all seasons to show affirmatively that even in collateral matters his appointment was beyond suspicion. The mere statement of the logical consequences of the contention made carries its own refutation. Manifestly official recognition and record of an appointment must supply the requisite proof in such a case, at least until impeached by other evidence.

In this case the mayor's official notification to the civil service commission of relator's appointment and the commission's recognition thereof in its roster kept in pursuance of statute, Code, Section 4483, supply the requisite *prima facie* proof, and no attempt was made to impugn this evidence.

However, in argument attention was called to the fact that the mayor's letter of notification of relator's appointment fails to recite that the appointment was made to meet an extraordinary exigency or to prevent stoppage of public business. The appointment nevertheless was made and was officially recorded by the civil service commission. Its validity depended upon the existence of the statutory conditions, or rather, the exercise in good faith of the mayor's determination of the existence of extraordinary exigency or an impending stoppage of public business. The mayor, having the power to appoint under certain conditions and having made an appointment, his exercise of power will be presumed to have been in accordance with, rather than in viola-

1914.]

State, ex rel, v. Keefer et al.

tion of law. Whether or not the existence of the statutory conditions be recited in giving notice of the appointment matters not at all, provided those conditions existed or were in good faith found to have existed by the appointing officer.

In view of the record evidence of the appointment in this case, the necessity for relator's temporary appointment by the mayor to avoid a stoppage of public business is not a matter essential to be proved by the relator in the first instance, but if put in issue as it was is matter to be developed in evidence as an affirmative defense. No evidence whatever was offered in support of this defense. Upon the first ground stated, therefore, the motion to dismiss was properly overruled.

II. The second ground of the motion, namely, that notice of a vacancy communicated to the civil service commission prior to any appointment was a condition precedent to action by the mayor, is not well taken for reasons which will be stated hereafter.

The underlying issues in the case remain to be considered. They may be briefly stated in the two-fold contention made in argument on behalf of the civil service commission, and are:

First. That the original appointment of relator was an invalid one; and,

Second. That by reason of Rule 73 of the rules and regulations of the Cincinnati civil service commission, adopted and promulgated in March, 1912, prior to relator's appointment, the latter's tenure or standing as a temporary appointee, if originally valid, terminated three months after the date of his appointment, or, to be exact, May 24, 1913. Rule 73, hereafter quoted in full, provides that:

“Such temporary appointment shall not continue . . . for a longer period in any case than three months.”

1. AS TO LEGALITY OF RELATOR'S APPOINTMENT.

It is to be borne in mind that the director of public service is the appointing officer for all positions in his department. By Code, Section 4481, the director of public service, on the occasion of a vacancy in the classified service, is required to notify

the civil service commission thereof. Thereupon it is the duty of the commission to certify to the director an eligible list for the position vacated, prepared as the result of competitive examination. From such eligible list the director may fill the vacancy. If no eligible list is forthcoming, the director is powerless. He has no power to make a temporary appointment, however much the public service may suffer by reason of the vacancy. Obviously the Legislature deemed it unwise to give to the official having the power to make permanent appointments from a list created by competitive examination the further power to fill vacancies temporarily without examination of applicants. It was doubtless thought, and wisely, that the power of making temporary appointments would be used to evade recourse to eligible lists. Accordingly the continuity of the public service was guarded by placing in another official, the mayor, the sole power to fill vacancies temporarily. The provision in this behalf is that of Code, Section 4488.

The statutory appointing powers of the mayor and the director of public service are distinct and independent. The mayor can make no permanent appointment; the director of public service can make no temporary appointment. Permanent appointments by the director are valid only if made in pursuance of Code, Section 4481; temporary appointments by the mayor are not contingent upon the taking of the several steps provided in Section 4481, and are valid if made in pursuance of an honest determination by the mayor that a temporary appointment is necessary to prevent the stoppage of public business or to meet an extraordinary emergency. Of course, if at the time of a vacancy occurring an eligible list for the position is available, no temporary appointment could be made, as no basis would exist for any appointing power on the part of the mayor.

In the present case no eligible list for relator's place existed at the time of his appointment, none exists today, and so far as appears, the civil service commission has taken no step to create such a list.

From the foregoing analysis of the statutory powers of appointment, both for permanent and temporary incumbencies, it

1914.]

State, ex rel, v. Keefer et al.

follows that in the case at bar relator's appointment was a valid one, being made under conditions such that no permanent appointment could by any possibility be made short of say three or four weeks, counting the two weeks required for notice of holding examinations and a further time for actual examination and the grading of applicants.

It may, of course, be contended that on the occurrence of a vacancy in the post which relator was chosen to fill, the director of public service was derelict in not notifying the civil service commission thereof. In point of fact, such notification would have served no purpose other than to hasten the commission in holding a competitive examination for the position. This purpose, and it is manifestly a highly important purpose, was in fact served by the mayor's letter to the commission, notifying it of relator's temporary appointment "in the absence of an eligible list." The failure of the director to send to the commission a formal notice of this vacancy was, as has been pointed out, in no sense a condition precedent to a valid appointment by the mayor, and in this instance at least it did not work a detriment to the interests of civil service, because the commission was notified one week later by the mayor, but has been unable presumably to furnish an eligible list to this day, eighteen months later.

These last considerations are doubtless somewhat beside the point, for a default, if default there was, on the part of the director of public service in no wise invalidates the relator's position as an applicant for the relief herein prayed for.

II. RULE 73 OF THE CINCINNATI CIVIL SERVICE COMMISSION.

In the rules and regulations of the civil service commission of Cincinnati, passed March, 1912, under the title, "Temporary Appointments," appears the following:

"73. In the absence of an appropriate eligible list from which to fill a vacancy, the Commission may authorize a temporary appointment without examination. Such temporary appointment shall not continue for more than ten days after an appropriate list has been established, nor for a longer period in any case than three months, nor shall a successive temporary appointment to the same vacancy be made."

If the language of Rule 73 be taken alone and adopted as an integral part of the civil service laws in force in municipalities in 1913, it is manifest that relator's standing, even as a temporary appointee under the statutes pertaining to civil service, ceased May 24, 1913, three months after his appointment.

By Section 4486 of the General Code (P. & A.), the civil service commission was empowered to "make such other rules and regulations as are not inconsistent with this chapter for the promotion and betterment of the service."

On this branch of the case, it is only necessary to inquire if Rule 73 in its apparent scope is consistent with the provisions of the so-called Payne law, providing for civil service in municipalities.

On behalf of the relator it is contended that Rule 73 is inconsistent with Section 4488 of the General Code, and is therefore not a valid regulation. Section 4488 provides:

"To prevent the stoppage of public business or to meet extraordinary exigencies as provided in this title, the mayor may make temporary appointments."

The view apparently advanced on behalf of the civil service commission is that the statute (Section 4488), provided no term or limitation of service for temporary appointees, and that hence a field was left open for the civil service commission to place restrictions and limitations upon the holding of such appointees; that when by regulation a limitation was fixed, such limitation is to be read into the law pertaining to civil service. The determination of whether or not this view is sound as applied to the present instance is fundamental in this case.

Before the adoption of Rule 73 of the Cincinnati commission, the incumbency or holding of a temporary appointee was limited only by the provisions of statute correlative to Section 4488. What then was this limitation? Manifestly the creation of an eligible list through an examination held on the initiative of the civil service commission.

Until such list is available, no permanent appointment can be made. The danger of stoppage of public business brought about by a vacancy in a position of any importance may be, and doubt-

1914.]

State, ex rel, v. Keefer et al.

less usually is, a continuing one. As long as such a vacancy can not be filled by a permanent appointee, the occasion for a temporary incumbency remains. The power placed in the mayor to appoint a temporary incumbent implies necessarily the right of the incumbent to hold his position, except in case of his discharge on proper grounds, during the continuance of the state of affairs which occasioned his appointment. In the present case, therefore, assuming that relator's appointment was originally a valid one, and leaving out of consideration for the moment Rule 73, there should be no room to doubt that relator is now legally entitled to hold his position, for which no examination, competitive or non-competitive, has yet been held.

Rule 73, if read into the statute law as a part thereof, has the effect of adding to the last phrase of Code, Section 4488, as follows, "*the mayor may make temporary appointments for a period not longer than three months,*" that part italicized being the new matter. Is this new matter "inconsistent" with the statute as enacted by the Legislature? If the interpretation above made of the statute apart from any rule is the correct one, it is manifest that the new matter added by Rule 73 works a diminution of the mayor's statutory powers. If the period of holding by temporary appointees, originally limited only by the creation of an eligible list for the position, may be by a local civil service commission limited to an arbitrary period of three months, such limitation may be reduced to one month or ten days or any period such that the courts could not say was manifestly unreasonable.

A moment's reflection will disclose the consequences of such a conclusion. At the end of three months, or it might be ten days, the temporary incumbency would cease. A succeeding temporary appointment is forbidden by the same Rule 73. If no eligible list is available, the position can not be filled at all, permanently or temporarily. The public service in the branch where the vacancy existed would be at a standstill. The public would be without recourse other than to mandamus its civil service commission, which perhaps is already doing its human best, to hold examinations and provide an eligible list so as to permit a permanent appointment. If a court is found to grant

this relief, a period of two weeks for advertising must elapse before the examination is held and a further reasonable time for grading applicants. If no applicant appears or if none of those who appear and are examined attain an average of 70 per cent. required by another rule, no eligible list will be forthcoming and the public service remains unattended to.

The possible consequences thus suggested are by no means fanciful or improbable.

It is said, however, that such is the law and that the courts are powerless to modify it. I am unable to bring myself to such a conclusion. The logical, and to my mind necessary construction of the statutes, apart from Rule 73, discloses a simple and ample provision for the continuity of the public service in case of a vacancy arising in a position for which no eligible list is in existence. To hold that an administrative board having no legislative powers can by the adoption of a rule or regulation detract from and possibly upset the deliberately enacted scheme of the Legislature, is a course for which I find no authority or reason.

There is no doubt of the power of a court in a proper case to review and determine the validity and application of the rules of a civil service commission.

In re Ricketts, 98 N. Y. S., 502, Syl. 5:

"The court has power to review a rule of a municipal civil service commission setting up requirements for examination for promotion in the civil service and to declare the rule invalid if it is unreasonable and improper."

Two cases in New York analogous in principle, though not on the facts, suggest the doctrine which is applicable in the case at bar:

People, ex rel Kastor, v. Kearney, 62 N. Y. S., 1097, Syl.:

"Section 124 of the charter of the city of New York which authorizes the civil service commissioners to provide a probationary period before appointment to a clerical position, does not authorize them to make rules as to removals, and so much of Section 35 of the rules issued by them as provides for the peremptory removal of an applicant during the probationary

1914.]

State, ex rel, v. Keefer et al.

period of six months established by the commissioners is invalid."

See also to the same effect *People, ex rel Orr, v. Scannell*, 66 N. Y. S., 182.

The true rule to be applied in determining the validity of Rule 73 of the Cincinnati commission, as applied to the present case, is briefly stated in *Wyman's Administrative Law*, Section 99:

"In execution anything may be done that is administration, nothing may be done that is legislation—is the principal distinction."

This distinction is given point by two decisions of the U. S. Supreme Court, referred to by the same author.

In *Morrill v. Jones*, 106 U. S., 466, the validity of a regulation of the Secretary of the Treasury was in question. The United States statute law provided that certain animals should be imported free of duty, subject to regulations that might be prescribed by the Secretary of the Treasury. The treasury regulation on the subject provided that the collector of the port should be satisfied that the animals were of superior stock. Mr. Chief Justice Waite said:

"The Secretary of the Treasury can not by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied that the regulation acted on by the collector was in excess of the power of the Secretary. The statute plainly includes animals of all classes. The regulation seeks to confine its operation to animals of superior stock. This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. * * * In our opinion the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

In *Merritt v. Welch*, 104 U. S., 694, there was under review another regulation of the Treasury Department designed to supplement an act of Congress applicable to duties on sugar. The act of Congress provided a schedule for sugars Dutch standard

in color. The Treasury regulation provided an additional chemical test to determine the saccharine strength of the sugar. Mr. Justice Bradley said:

"There are two very distinct modes of distinguishing sugar. One is determined by the color standard; the other by a chemical standard. Which of these did Congress adopt? We think clearly the former. If it be found by experience that the standard of the statute is a fallacious one, can the executive department supply the defects of legislation? Congress alone has the authority to levy duties, and its will alone is to be sought."

The text-writer last quoted concludes:

"When a regulation is found with no positive law in support of it, the regulation is thus held void; how much more will the regulation be held void when it is found that it is inconsistent with positive law."

The conclusion is, therefore, not to be avoided that Rule 73, if applicable at all in this case, is inconsistent with General Code, Section 4488, and to the extent that it is inconsistent therewith, it is void.

It should be said in his connection that no criticism is made or intended of the provisions of the commission's Rule 73, considered from the viewpoint of propriety in intent, as distinguished from validity in law. It is in the interests of true civil service that temporary appointments be temporary in fact as well as in theory. It may even be that the commission adopted this rule as a prod to the various appointing officers of the city government, and also as a self-imposed ideal. So far as appears from the testimony in the present case, the failure for eighteen months to provide an eligible list for the position of valvemen was due rather to the magnitude of installing a comprehensive system of competitive examination in a large city, rather than to any inactivity on the part of the commission. Indeed, this very consideration may well have been present in the minds of the legislators in enacting the provisions of the Payne law with reference to temporary appointments.

Support for the conclusions thus indicated may also be found in the analysis of Rule 73 in conjunction with Rule 74 of the Cincinnati commission, under the same title:

1914.]

State, ex rel, v. Keefer et al.

“Rule 74. A temporary appointment to prevent the stoppage of public business or to meet extraordinary exigencies shall continue only until such time as the commission can certify persons from an appropriate eligible list to fill the vacancy.”

It will be observed that the wording of Rule 74 coincides exactly with that of General Code 4488, and that the continuance of a temporary appointment is by the rule declared to be that precisely which is fixed by unavoidable implication from the statute. In other words, Rule 74 is merely declaratory of the statute law.

On the other hand, Rule 73 pertains to a vacancy to which “the commission may authorize a temporary appointment without examination.”

It will be borne in mind that under the statute in force, when these rules were adopted the commission was vested with considerable discretion in determining what places were in the classified and what in the unclassified service. The presumption is, therefore, strong that Rule 73 was intended to permit a temporary enlargement of the unclassified service, dispensing with competitive examination within limits under the strict and immediate control of the commission itself. In the absence of such a construction of the two Rules 73 and 74, they are mutually inconsistent. The construction suggested makes them consistent. It would appear, therefore, that Rule 74 applies and was intended to apply to temporary appointments by the mayor under Code, Section 4488, and that Rule 73 does not and never did so apply. This suggestion is further borne out when it is considered that the civil service commission has not and never had the authority to *authorize* the *mayor* to make temporary appointments. The mayor's authority in this respect is derived solely from the statute, which the commission is powerless to enlarge or diminish.

In any event, Rule 74 is consonant with and declaratory of the statute law as it stood in 1913, prior to the last amendment, and its provisions have been substantially copied in Section 14, par 1, of the civil service Act of April 28, 1914, now in force, which reads in part as follows: “*such provisional appointment shall continue in force only until regular appointment can be*

made from eligible lists prepared by the Commission, and such eligible lists shall be prepared within ninety days thereafter."

It is obvious that the language italicized fixes the duration of a temporary appointment, and that the concluding phrase of the statute just quoted is mandatory, or at least directory, only to the civil service commission.

At the oral argument of this case counsel for the commission laid much stress upon the authority of the case of *Shalvoy v. Civil Service Commission of New Jersey*, 84 N. J. L., 134, in which an opinion on rehearing is found at page 547 of the same report. The syllabus, at p. 134. is as follows:

"A court officer temporarily appointed pursuant to Section 29 of the civil service act and holding over after the expiration of the two months' temporary service allowed thereby, is not holding office or employment *de jure*."

It was urged, upon the authority especially of this case as well as other cases which I shall not cite, that relator is at most an incumbent *de facto* and not *de jure*, and in consequence his lawful incumbency and the right to be paid for his services long ago ceased by operation of Rule 73 of the Cincinnati commission and by the coming into operation of the existing civil service statute. This contention has already been fully dealt with and need not be further considered, except to point out that a temporary appointee placed in position by virtue of a specific power granted by the civil service statutes of the state (in this case, Code, 4488) holds his position by virtue of that law and is serving *de jure* until by operation of that same law his service expires. The relator in this case, therefore, holds his employment *de jure*, because by law his employment expires, even on the theory most unfavorable to his holding, only upon the creation of an eligible list for his position.

As the relator was legally appointed to a place in the classified service under the statute law in force at the time of his appointment, and as his standing as a temporary appointee has not terminated by the creation of an eligible list for his position, it should be plain that his holding is protected by the provisions of Section 31 (Schedule) of the act of April 28th, 1913, as follows:

1914.]

State, ex rel, v. Keefer et al.

“All officers and employees in the classified service of the state, the counties, cities and city school districts thereof holding their positions under existing civil service laws, shall when this act takes effect, be deemed appointees under the provisions of this act.”

The pleadings in this case do not raise the issue of whether or not the relator is an “incumbent” within the meaning of Section 10 of the act of April 28th, 1913, and therefore entitled to hold his position upon passing a non-competitive examination. I have, therefore, not formed or sought to form a conclusion upon that point, and the use of the phrase “incumbent” in this opinion is intended to have the sense of one performing the duties of a position, rather than a technical sense.

This opinion should perhaps not conclude without some reference to the case of *Lea v. State*, 15 C.C.(N.S.), 28, which was commented upon in argument by counsel for both sides. In the *Lea* case, at a time when the civil service provisions of the *Payne* law had come into effect, the director of public service of Cleveland (not the mayor) had appointed an inspector of street lighting without reference to the Cleveland civil service commission or to any eligible list. In fact, the city civil service commission had not organized or held competitive examinations, and no eligible list was available. The appointee sought to hold as a permanent official, and the director of public service refused to certify a vacancy in his post to the civil service commission. A writ of mandamus was issued, and properly, to compel the director to certify the vacancy. There was no question in this case of the validity of a temporary appointment by the mayor. Evidently the case is much misunderstood. Obviously the intended permanent appointment by the director of public service was invalid because not made in pursuance of Code, Section 4481, and the director had no statutory power whatever to make any temporary appointment. The decision in the *Lea* case, therefore, has no application in the case at bar and is not helpful in its consideration.

At the conclusion of the oral argument in the present case the court was furnished a copy of an opinion in the case of *State, ex rel Mugaven, v. Civil Service Commission of Cincinnati*, 12 O.

L. R., 204, very recently decided by one of the judges of the common pleas court of this county. That court, upon facts apparently similar to those disclosed by the pleadings and evidence in this case, refused the relief herein prayed for. The opinion of the learned common pleas judge has been read and considered with great care and respect. For the reasons herein stated, however, this court is unable to concur in the conclusions there announced.

A writ of mandamus will issue as prayed for.

RELIEF FOR EMPLOYEES SUFFERING FROM OCCUPATIONAL DISEASES.

Common Pleas Court of Hamilton County.

DAVID BROWN V. THE INDUSTRIAL COMMISSION OF OHIO.

Decided, May 16, 1914.

Workmen's Compensation Law—Construction of, With Reference to Compensation for Diseases Induced by Occupation—Appeal from Determination by State Liability Board of Awards.

The relief contemplated by the workmen's compensation law includes lead poisoning, where suffered by an employee in the course of his employment.

Thomas L. Pogue, Prosecuting Attorney, and *John V. Campbell* and *Carl M. Jacobs*, Assistant Prosecuting Attorneys, for the demurrer.

Kelley, Huseman & Remke, contra.

COSGRAVE, J.

This cause comes on to be heard on a demurrer to a petition appealing from the decision of the Industrial Commission of Ohio, for the reason that the facts stated in the petition do not constitute a cause of action.

The plaintiff, David Brown, alleges that on or about the 12th day of August, 1913, he was employed by the Eagle White Lead

1914.]

Brown v. Industrial Commission.

Company, of Cincinnati, which was a contributor to the state insurance fund under the workmen's compensation law, and by reason thereof the plaintiff was entitled to compensation on the facts alleged in his petition.

The plaintiff alleges that while in the employment of the said Eagle White Lead Company, which was engaged in the manufacture of commercial white lead and other products usually manufactured in a lead factory, on or about August 26, 1913, while in the performance of work assigned to him by his foreman, that of charging and drawing the kilns, the plaintiff (appellant) was taken sick with what is known as lead colic or lead poisoning; that he was disabled and compelled to give up his work and go to a hospital for treatment and remained there until September 26th, when he left said hospital, though he has been under a doctor's care since, and has been totally or partially disabled from said injury, and that by reason of said disability and of the fact that the said Eagle White Lead Company was a contributor to the state insurance fund, he made application for compensation to the state liability board of awards, then charged with the duty of administering the state liability law; that the plaintiff's claim was No. 11,656 upon the records of said board of awards.

It appears further that the Industrial Commission of Ohio became the successor of said state liability board of awards and is now charged by law with the enforcement of the provisions of the workmen's compensation law.

It appears further from the petition that on or about the 2d of January, 1914, the defendant, the Industrial Commission of Ohio, issued a notice to appellant, disallowing his claim and denying him the right to participate at all in said state insurance fund, giving as a reason for said denial that appellant's disability was not caused by an injury sustained while in the course of his employment; that under the provisions of said law, he was entitled to appeal to the court of common pleas of the county in which he resided, for a reversal of the action of said board and for a trial before said common pleas court, or before a jury in said court, if he so demands.

The appeal seeks from this court the relief which the plaintiff alleges he is entitled to receive from said state board.

The demurrer admitting the truth of the allegations of the petition, presents for the determination of this court, the single question whether the injuries mentioned in this petition are of such a character as to entitle the plaintiff to relief under the workmen's compensation law of this state.

Section 36, or Code Section 1465-75, contains the provisions of the law which are presented to this court for construction and determination, and are as follows:

"The board shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final.

"Provided, however, in case the final action of such board denies the right of the claimant to participate at all in such fund on the ground that the injury was self-inflicted or on the ground that the accident did not arise in the course of employment, or upon any other ground going to the basis of the claimant's right, then the claimant within thirty (30) days after the notice of the final action of such board, may, by filing his appeal in the common pleas court of the county wherein the injury was inflicted, be entitled to a trial in the ordinary way, and be entitled to a jury if he demands it. * * *

"Within thirty days after filing his appeal, the appellant shall file a petition in the ordinary form against such board as defendant and further pleadings shall be had in said cause according to the rules of civil procedure, and the court, or the jury, under the instructions of the court, if a jury is demanded, shall determine the right in his favor, shall fix his compensation within the limits and under the rules prescribed in this act; and any final judgment so obtained shall be paid by the state liability board of awards out of the state insurance fund in the same manner as such awards are paid by such board."

It is said this is the first case of this kind that has been presented to any of the common pleas courts of our state for adjudication. As this class of legislation is of somewhat recent origin, at least in this country, and as the enactments of the various states are not entirely similar, the court has not received much aid from any of the reported decisions except a few hereinafter referred to, which, indeed, have been very helpful.

1914.]

Brown v. Industrial Commission.

In some of these enactments in other states, and indeed in our own, the use of the word injury in one part of the act and of accident in other parts, has made the question somewhat difficult of determination. Laws of a similar character have been in existence in Germany and in England for a great many years, and have been administered in those countries with very great success. The English courts in order to give effect to their act which provided for compensation where the workman received personal injury by accident, frequently held that disease induced by accidental means came within its provisions.

The courts of England strove to give effect to their workmen's compensation law, interpreting the words, "personal injury" as an injury to the person as distinguished from an injury to property. Finally, by a recent enactment, the law of England was made to cover diseases known as occupational diseases.

In some of our states, notably the state of Washington, it is significant that the law of that state specifically excludes occupational diseases, for it says:

"The words injury or injured as used in this act, refers only to an injury resulting from some fortuitous event as distinguished from the contraction of diseases."

The fair inference from the use of this language would be that the Legislature of that state well concluded that unless occupational diseases were expressly excluded, it would be reasonably inferred that they were included and covered by the words "injury" or "injured."

The California act covers only personal injuries accidentally sustained, and is very similar to the English act. The English act couples with the word injury or injured, the element of accident.

In a case in our own county, decided by Judge Pugh in the superior court of this city in January, 1914, reported in 15 N.P.(N.S.), 273, while it was not a case that came into that court by appeal because the common pleas court is the only court that has appellate jurisdiction in matters of this kind, His Honor, Judge Pugh, expressly held that the expression "personal injuries" as used in the workmen's compensation act of

this state, includes occupational diseases contracted in the course of employment. In the course of his opinion the learned judge uses the following language, in which this court heartily concurs:

"As a matter of fact, occupational diseases such as lead poison, anthrax, phosphorous poisoning and the like, are usually much more injurious to the sufferer than the pains, deformities and mutilations caused by accidents.

"Every reason that lies at the foundation of a law protecting a workman from the consequences of accidents applies in most cases with double force in cases of occupational diseases. To limit the workmen's compensation act to cases where injuries result from accident, requires that the word 'accident' or 'accidental' be read into the statute, and, under the usual rule of statutory construction, strong evidence of legislative intent to that effect should appear."

The Supreme Court of Massachusetts recently rendered two well considered opinions relative to occupational diseases. The first of these cases is *In re Hurle*, decided on February 28, 1914, to be reported in 104 N. E., 336, to be found in the advance sheets of the *N. E. Reporter* for March 24, 1914. In this case the court held:

"That the statute is to be liberally construed, and an employee suffering a total loss of vision in both eyes, resulting from an acute attack of optic neuritis, induced by poisonous coal tar gases escaping from furnaces about which he was required to work, was entitled to compensation, the phrase personal injuries, and injuries, being broad enough in their signification to include the injury in question."

In the more recent case of *Johnson v. London Guaranty and Accident Company*, decided by the same court on April 4, 1914, to be reported in 104 N. E. Reporter, 735, it lays down the following rules of law:

"1. Personal injury within the workmen's compensation act includes any injury or disease; as lead poisoning arising out of or in the course of employment, causing incapacity for work and thereby impairing ability for earning wages.

• • • • •

1914.]

Brown v. Industrial Commission.

“3. The personal injury of a lead grinder, incapacitating him from work resulting from the accumulated effect of gradual absorption of lead into his system arises out of and in the course of his employment.”

The Massachusetts law is similar to our Ohio law.

While the courts of one state are not bound absolutely to follow the decisions of the courts of last resort of sister states or of foreign countries, yet it is the settled rule to receive such decisions with great respect and give them great weight in considering matters of like import in our own courts. The reason for this rule is because of the fact that cases that have been determined by the courts of last resort reach those courts with the accumulated learning of the judges in the lower courts, aided by the knowledge and learned arguments of counsel; so that it has presented to it the combined judgment of many minds skilled and learned in the law and hence it is that this court, following this long established rule, adopts the decision of the Supreme Court of Massachusetts as the law of this court, for the purposes of this case, and especially because it is in harmony and in accord with the views of this court in the matter.

This law is designed in the construction herein given to it to protect men who imperil their health, if not their lives, to produce for the benefit of their fellow-men products that are essential and necessary in the arts and sciences, and are in so many ways beneficial and necessary to mankind. It is urged that this construction of the law will give rise to abuses and impositions on the part of those employed in these hazardous occupations, and that it will result in carelessness and heedlessness on their part. The experience of time does not justify this conclusion.

It may be urged in reply that when fire insurance first came into vogue it was predicted that there would be frequent and deliberate destruction of property in order to obtain the benefits of such insurance. Experience has demonstrated that while there may have been some cases of arson, they are so few and far between as not to be worthy of mention. The same reasoning was urged against life insurance, it being claimed it would

lead to recklessness in the manner of living, if not to deliberate self-destruction, and while there may have been, and doubtless were, some cases of self-inflicted death to obtain such insurance, yet so rare indeed have they been that no man of sound judgment would today suggest the abandonment of the very great benefits derived therefrom. The same was said as to health and accident insurance. The experience of man has been such as to demand the increase and maintenance of these different plans of insurance.

It must not be forgotten that the moral obligation of men, their moral sensibilities and their consciences, act in restraint of the abuses that were so freely predicted with reference to these systems of insurance. The law of self-interest and of self-preservation also operates in the same direction.

It is likewise urged in argument that those who have made a careful study of this matter of occupational diseases and compensation therefor, have found that since the adoption of these laws both in Germany and England and in several of our own states, restrictive and preventative measures have been resorted to both by the legislative bodies, our own state among the number, and by those engaged in these manufacturing industries applying new and more scientific processes in the manufacture of these deleterious substances, thus tending very materially to lessen their frequency and neutralize their evil effects, and likewise leading to the final elimination of the dangers now attendant thereon, all of which serves to increase human happiness and decrease human misery.

The demurrer to the petition will be overruled and the right of the plaintiff herein to have a hearing in this court upheld. This court has been given to understand that the state industrial commission desires to make this a test case and obtain a decision thereon from our court of last resort as soon as possible. To this end an entry may be at once prepared overruling the demurrer.

1914.]

Lynch v. State.

PROSECUTION FOR VIOLATION OF LIQUOR LAWS.

Common Pleas Court of Delaware County.

DANIEL LYNCH V. STATE OF OHIO.

Decided, 1913.

Intoxicating Liquors—Jurisdiction of Mayor Over Violations of Liquor Selling Laws Occurring Within the County.

The mayor of a village has jurisdiction in case of an alleged illegal keeping of a place for the sale of intoxicating liquor in a municipality located in the same county.

Marriott, Freshwater & Wickham, for plaintiff in error.

J. A. White, contra.

FULTON, J.

Daniel Lynch, the plaintiff in error, was prosecuted before H. W. Stone, mayor of the village of Sunbury, Delaware county, Ohio, upon an affidavit filed by T. B. Williams, sheriff of Delaware county, Ohio, which affidavit reads as follows, leaving out the formal parts:

“That from the first day of September, A. D. 1912, until the 12th day of May, 1913, in the city of Delaware, state of Ohio, county of Delaware, one Daniel Lynch was then and there the unlawful keeper of a place where intoxicating liquors were then and there unlawfully sold by the said Daniel Lynch in violation of the act of the General Assembly of the state of Ohio with reference to the sale of intoxicating liquors in the state of Ohio, to the common nuisance of the citizens and people of the said state of Ohio, and contrary to Section 13195 of the General Code and to the place and dignity of the state of Ohio. Further deponent says not. (Signed) T. B. Williams.”

Said Daniel Lynch was arrested upon a warrant issued upon said affidavit, and was taken before said mayor, and upon a hearing was found guilty of the charge contained in said affidavit, and a fine was assessed against him of \$500.

A petition in error has been filed in this court to reverse the judgment of the mayor.

The court has carefully examined the affidavit and the briefs of counsel, and has given to this case such consideration as it has been able, and the court thinks it has carefully considered every point which has been raised by plaintiff in error to set aside the judgment of the mayor.

The court thinks that this case is similar in every respect to the case reported in the 12 C.C.(N.S.), 330, except that the prosecution in that case was in the city of Delaware, Ohio—the prosecution in this case now under consideration being in the village of Sunbury, Ohio.

The court is of the opinion that the mayor of Sunbury had jurisdiction to hear and determine this case, and that the case reported in the 12 C.C.(N.S.), above referred to, which was *Daniel Lynch v. State of Ohio*, and which was heard and determined in the circuit court, and afterwards affirmed by the Supreme Court of this state, controls and is binding upon this court, and for that reason this court affirms the judgment of the mayor of Sunbury.

As to the fine assessed against the plaintiff in error in this case, the court thinks that, under Section 13195 of the General Code, the mayor had the right to fine the plaintiff in error in the sum of \$500. The statute says he shall not be fined less than \$100 nor more than \$500. The fine of the mayor in this case is not beyond the limits of the statute. Exceptions may be noted.

1914.]

Cincinnati v. Ziegler.

**APPROPRIATION BY ONE MUNICIPALITY OF LAND LYING
WITHIN ANOTHER MUNICIPALITY.**

Common Pleas Court of Hamilton County.

CITY OF CINCINNATI V. WILLIAM ZIEGLER AND FRED SCHMUTTE.

Decided, September 1, 1914.

*Municipal Corporations—Appropriation of Property for Park Purposes
—Compensation Limited to Present Value, Irrespective of Benefit
from the Proposed Improvement—Land Lying in an Adjacent Mu-
nicipality Taken in Enlarging Park Area.*

1. Where a municipality has acquired property by gift and purchase for park purposes, an abutting owner whose land it is sought to appropriate as an addition to the park area, is entitled to recover as compensation only the present value of his property, without regard to benefits likely to result from the proposed improvement.
2. The grant of power by the General Assembly to municipalities to appropriate property for public purposes, authorizes the appropriation of contiguous land notwithstanding it may lie within the territorial limits of an adjoining municipality.

Wm. C. Meyer and E. A. Tepe, for the motions.

Walter M. Schoenle, City Solicitor, and Saul Zielonka, Assistant City Solicitor, contra.

Heard on motion of William Ziegler for a new trial and the motions of Fred Schmutte to dismiss the proceedings and for a new trial.

GEOGHEGAN, J.

The motion of the defendant Ziegler for a new trial is based principally upon an alleged error of the court in refusing to give a special instruction to the jury to the effect that the jury might consider the fact that the property of the defendant Ziegler abutted upon other property that had been acquired by the city of Cincinnati through its park commissioners for a boulevard, and the refusal of the court to admit testimony as to its alleged enhanced value by reason of that fact.

This proceeding was one to appropriate property for park purposes. The property sought to be appropriated is situated in the northern part of Cincinnati, in the valley commonly known as Bloody Run. An extensive plan of park boulevard improvement known as the Kessler plan has been adopted by the park commissioners of the city of Cincinnati for the purpose of constructing a park boulevard across the greater portion of the northern part of the city of Cincinnati. The property of the defendant Ziegler is situated in that portion of the improvement known on the plan as Section 5. In that section and in pursuance of the adopted plan the park commissioners had by purchase and by gift acquired considerable property, and appropriation proceedings were commenced by proper legislation to acquire the property of the defendant Zeigler. The defendant Zeigler's property was used at the time of the passage of the resolution as pasture land, but it had been for a number of years platted into lots, the subdivisions being duly recorded in the office of the recorder of Hamilton county. However, there were no made streets or other improvements and certain of the lots were so platted as not to face upon any public street. A certain Mrs. Bragg, in pursuance of the plan adopted by the park commissioners, by deed of gift transferred to the city of Cincinnati a large amount of property, and the commissioners acquired by purchase certain other parcels, leaving the property of the defendants Zeigler and Schmutte as the only ones necessary to obtain in order that the proposed section of the improvement might be completed. These proceedings were started for that purpose and the defendant Zeigler claimed that inasmuch as certain of his lots which formerly had no outlet on any public street, now abutted on the property acquired by the city by gift and by purchase, that he would be entitled to recover the enhanced value of that property and complains that the court erred in refusing to submit this question of the enhanced value to the jury, or to allow evidence to show this enhancement to be presented to the jury.

The court stated in the oral argument on the motion for a new trial that it was its opinion that the value of the property

1914.]

Cincinnati v. Ziegler.

should be assessed irrespective of any benefit by reason of the proposed improvement, and that inasmuch as the acquired amount of the Bragg property and the other property by the city was in pursuance of the improvement and a part of the plan, that the defendant Zeigler could obtain no advantage by reason of the fact that his property now abutted upon this property acquired in the course of and for the same improvement.

An examination of the authorities convince the court that his first impression of the matter was the correct one.

In *Lewis on Eminent Domain*, 3d Ed., page 1329, Section 745, it is said:

“Whatever the time fixed upon with reference to which the compensation shall be estimated, the owner is entitled to the actual value of the land at that time, even though it may have been enhanced by reason of the projected improvement for which it is taken. It is said this is not really making the condemning party pay for an enhancement caused by its own work, as such enhancement does not come from the mere projection of the work, but from the existence of circumstances which create a demand for the work, and render it probable that such a work will sooner or later be built. In so far as the enhancement is due to such circumstances no doubt it is properly considered and allowed. But it may be doubted whether the rule should go any further. If the proposed improvement had depreciated the value of the property, it would be very unjust that the condemning party should get it at its depreciated value, and the correct rule would seem to be that the value should be estimated irrespective of any effect produced by the proposed work. It has been held improper to consider what the property would have been worth if it could have had the benefit of the proposed improvement without being taken.”

This rule seems to be in consonance with a very great number of accepted authorities: *May v. Boston*, 158 Mass., 21; *Vowditch v. Boston*, 164 Mass., 107; *Mowrey v. Boston*, 173 Mass., 425; *Gibson v. Norwalk*, 13 O. C. C., 428; *Shoemaker v. United States*, 147 U. S., 282; *Railroad Co. v. Coleman*, 3 Washington, 228; *In re Water Commissioners*, 3 Edwards Ch., 552; *Abbott v. Southern Pac. R. R. Co.*, 109 Cal., 282.

In *May v. Boston*, *supra*, the court in its opinion at page 29, uses language peculiarly applicable to the matter here in hand:

"It was evidently the purpose of the Legislature not to permit landowners to recover damages for the land taken for a public use at a value enhanced by a public improvement which owes its existence to the change of use of the very land which is to be paid for. Land taken is to be paid for at its value. Its value is to be determined by a consideration of the uses to which it is adapted. Its market value can not legitimately be founded on anything else. It may have a market value largely dependent on a probable future demand for it; but that which is relied on ultimately to create the demand is the valuable uses to which it can be put. Whenever there is an expectation of a public improvement, the market price of land in the vicinity is likely to advance, in anticipation of the more valuable uses to which the land can be put when the improvement is made. Its real value for use is not increased until the change in its surroundings comes. If the unexpected improvement involves the taking of land by the right of eminent domain, the value of the land taken will never be enhanced by the improvement, for the taking precludes the possibility of ever using it under improved conditions. In that respect it stands differently from other land in the vicinity which is not taken. Whenever there is a project for laying out or widening a way, or taking land for any other public use which is expected to increase the value of real estate in the neighborhood, if the market price of land in the vicinity rises in anticipation of the change, the statute very justly says that the land taken shall not be paid for at the increased price. If it is known from the beginning exactly what land will be taken, it must also be known that that particular land can never be made more valuable by the improvements, since it can never be used by its owner under the improved conditions. If the plan is general, and it is not known exactly what land will be needed by the public, but only that some land will, whenever the plan takes definite form, and the location is fixed, it is known that the land to be taken has not received, and never can receive, any benefit from the improvements. There is no injustice in saying that such land shall not entitle its owner to be paid out of the public treasury at a rate determined, not by its value for use, but by a prospective and speculative value of land in the vicinity, derived from an expectation of the benefit to come from the public use for which this is to be taken. One holding or buying or selling land in a neighborhood where the market price has risen in anticipation of the public improve-

1914.]

Cincinnati v. Ziegler.

ments which will involve the taking of a part of it for a public use, is bound to know that under the statute the land which will be taken for such a use can be paid for only at its value, unaffected by the improvements. *Benton v. Brookline*, 151 Mass. 250. The constitutionality of legislation of this kind was established in *Dorgan v. Boston*, 12 Allen, 223, 231.'

This line of reasoning may well be applied to our statute providing for the appropriation of property for boulevard purposes. It certainly could not be within the purpose of the law that property owners either through stubbornness or avarice could hold out until the city had acquired other lands by gift or by purchase and then by compelling the city to enter into proceedings to appropriate their property, to recover for whatever additional value might be added to their lands by reason of the fact that the city had acquired for the same improvement lands adjacent thereto. No constitutional rights are derogated from by this construction. The property owner is still allowed the full value of his land as it stood at and prior to the time of the proposed improvement. Nor do I think that this construction is out of harmony with the rule laid down by Judge Ranney in *Giesy v. Railroad Company*, 4 Ohio St., 308, at page 332:

"The jury are not required to consider how much, nor permitted to make any use of the fact that it may have increased in value by the proposal or construction of the work for which it is taken."

This has long been the rule in Ohio, and it would seem to be an injustice to the public that a property owner might hold out while other lands are being acquired by gift or by purchase and then recover the enhanced value to his land by reason of the fact that it abutted on those lands which had thus been acquired by the public for the same general improvement.

The motion for a new trial, therefore, as to Ziegler will be overruled.

Second. Another and different question is presented by the motion to dismiss on the part of the defendant, Fred Schmutte. The evidence shows that Schmutte's property lies entirely within the corporate limits of the city of Norwood, a municipality

immediately adjoining and contiguous to the city of Cincinnati. The property, however, lies exactly within the lines of the proposed improvement and is contiguous to the city of Cincinnati. Counsel for Schmutte based his right to have the proceedings dismissed, entirely upon the theory that it can not be presumed to have been within the legislative intent that the city of Cincinnati should have the power to appropriate property for park purposes when that property lies within the corporate limits of another municipality. He admits that the statutes pertaining to the subject authorize the appropriation of property for park purposes within the limits of the appropriating municipality, or the territory contiguous to such municipality (Sections 3677, 3678, 4060, General Code). But he denies that the words in the statute, "or the territory contiguous to such city" (Section 4060, General Code), and, "the corporation may, when reasonably necessary, acquire property outside the limits of the corporation" (Section 3678, G. C.), show a legislative intent to authorize a municipality to acquire property by appropriation proceedings which lies wholly within the corporate limits of another municipality having itself the same rights of eminent domain.

When this proposition was submitted to me upon the oral argument I was strongly impressed with what then appeared to me to be the apparent correctness of this construction of the statute, but an examination of the authorities, however, convince me that this construction is, in view of the language of the statutes referred to above, entirely erroneous.

In *Dillon on Municipal Corporations*, 5th Ed., Vol. 3., Section 1028, it is said:

"The power of the Legislature to authorize a municipal corporation to acquire *lands beyond the municipal limits* and for that purpose to exercise the power of eminent domain can not be disputed. It has long been recognized to exist where the use for which the property is taken is a proper and reasonable public use. It has been said that power to condemn lands beyond the municipal limits must be *expressly conferred* upon the municipality. But what is express power is largely a matter of construction. In construing the authority conferred upon

1914.]

Cincinnati v. Ziegler.

municipalities it has been held that if a city is authorized to engage in a public improvement beyond its limits and to acquire land therefor, a general power of eminent domain conferred upon it to acquire land for its corporate purposes may be exercised to effectuate the improvement beyond the city limits."

Now certainly it can not be denied that the Legislature of this state has conferred upon municipalities in general terms and upon the board of park commissioners specifically, power to acquire land for park and boulevard purposes in territory contiguous to and beyond the limits of the municipality. There does not seem to be any reason, therefore, to narrow the construction of these statutes so that the words, "beyond the limits of the city," and "territory contiguous to such city" will apply only to such territory contiguous to a municipality as is not included within the corporate limits of another municipality.

This precise question was raised in the case entitled "*In the Matter of the Application of the Mayor, Alderman and Commonalty of the City of New York to Acquire Title to Certain Lands for Public Parks, etc.*," 99 N. Y., 569, and the court there in a well considered opinion upheld the power of the municipality to acquire land by appropriation proceedings beyond the corporate limits of the city of New York, and in so holding relied largely upon a previous decision of the same court in the case of *Matter of Lands in the Town of Flatbush*, 60 N. Y., 398, wherein the city of Brooklyn was upheld in its attempt to appropriate lands for park purposes both within its corporate limits and within the limits of the town of Flatbush and the town of Newlots.

In *State v. King County Superior Court*, 35 Washington, 303, the power to acquire lands beyond the corporate limits of the state for the purpose of establishing ferries was upheld, and no exception seems to have been made to the rule with reference to whether or not the land sought to be acquired was within or without the corporate limits of another municipality. This same principle was upheld in *Helen v. Grayville*, 224 Ill., 274; *Warner v. Gunnison*, 2 Col. App., 430; *Coldwater v. Tucker*, 36 Mich., 474; *McBean v. Fresno*, 112 Cal., 159; *Land & Mining Co. v. Billings*, 111 Fed., 972.

It would seem that in view of the above authorities the distinction sought to be made by counsel for defendant is not tenable. It certainly would be entirely within the right of the Legislature to grant to the city of Cincinnati the right to condemn property within the corporate limits of the city of Norwood in specific terms; the only limitation being that the appropriation should be for some public use or purpose. If the Legislature undoubtedly has the power to grant the right in specific terms, it can not be said that the mere fact that the Legislature has used general terms excludes any legislative intent to grant what it might have granted in specific terms.

The property of Schmutte lies contiguous to the city of Cincinnati and is within the lines of the proposed improvement. The improvement is one that has been authorized by statute. The defendant Schmutte had his day in court and the question of the assessment of the compensation to be paid to him was left to the jury. The court had jurisdiction both over the subject-matter and over his person, and all his constitutional rights in the matter were preserved.

Therefore, his motion to dismiss as well as his motion for a new trial will be overruled.

1914.]

Telephone Co. v. Telephone Co.

**STATUS OF MUTUAL TELEPHONE COMPANIES UNDER THE
PUBLIC UTILITIES ACT.**

Common Pleas Court of Williams County.

**THE MONTPELIER TELEPHONE COMPANY V. THE MONTPELIER
MUTUAL TELEPHONE COMPANY ET AL.**

Decided, June 27, 1914.

Telephone Companies—Operating Not for Profit Not Subject to Public Utilities Commission—Burden of Showing Character of Organisation—Permissive License to Mutual Company to Operate in a Village—Not Open to Attack by a Company Operating for Profit in Same Territory.

1. A mutual telephone company, existing and operated as a utility but not for profit, does not come within the jurisdiction of the state public utilities commission and may operate a plant without having first obtained a certificate of necessity.
2. The council of a village has power to grant to such a company permissive license to enter upon the the streets and alleys for the construction and maintenance of its plant; and the fact that the ordinance in which it was attempted to grant such a permissive license was illegally passed does not afford ground for an injunction against such operation at the instance of a company operating telephone lines for profit in the same territory.

Newcomer & Gebhard. for plaintiff.

Charles A. Bowersox and Reuben L. Starr. contra.

SCOTT. J.

For the sake of brevity we omit a recital of all but the substance of the pleadings in this case, and come to state, briefly, the issues of law and fact raised by the respective pleadings of the parties to the cause, and which issues the court is now called upon to decide and determine in the light of the law and the evidence.

The plaintiff contends that the defendants have no right to construct or operate a telephone plant in the village of Mont-

pelier, this county, and bases such contention upon the following reasons:

1. That no franchise was legally passed granting to the defendant, the Montpelier Mutual Telephone Company, the right or authority to invade the said village and the territory adjacent thereto, and to erect or operate a telephone plant therein.

2. That without a franchise the defendant the Montpelier Mutual Telephone Company is without right to construct a telephone plant or system in the said village, and use the streets and alleys thereof for its said plant.

3. If the defendant is a purely mutual company and is not organized to serve the public, then it can not acquire public property for a purely private purpose.

4. If the defendant is serving, or intends to serve the public, then it must first obtain a certificate of necessity from the public service commission of the state.

5. Plaintiff asserts it has a right to bring this action.

The defendants answer, admitting certain allegations of the petition, and then set forth in detail the plans and purposes for which the Montpelier Mutual Telephone Company was organized, as a partnership, or association of certain persons, as members thereof.

The defendants admit in their answer that the plaintiff company is a tax-payer of the village of Montpelier, and is the owner of a telephone plant therein, the lines of which extend many miles in all directions from said village into the country surrounding said village: that the said plaintiff was granted a franchise to operate and conduct its telephone business within the said village of Montpelier: that the defendant the Montpelier Mutual Telephone Company has done and is about to do many of the acts alleged in the petition of the plaintiff.

The defendants fully set forth in their answer the purposes of said association, and state that said defendant, the Montpelier Mutual Telephone Company, is an institution or an association organized for the purpose of doing business as a telephone company organized and operated as such, not for profit, and

being such creature of the law it does not come within the purview of the so-called public utilities act found in Volume 102, pages 449 to 575, of the acts of the Legislature of the state.

The general denial in the answer of the defendants casts upon the plaintiff the burden of proof as to every material allegation of its petition not admitted by said answer. The reply of the plaintiff casts upon the defendants the burden of proving every material allegation in their answer, save such as are admitted by said reply. The defendants are therefore called upon to prove by a preponderance of the evidence that its association or co-partnership is one that was not only organized as a telephone company not for profit, but that in fact its purpose is to operate as a telephone company not for profit. Upon filing the petition of plaintiff a temporary restraining order issued by action of the probate court. The point is, shall this temporary order be dissolved or made perpetual?

We find ourselves confronted with a heavy burden in our attempt to make disposition of and determine the salient legal questions that present themselves before us. That we may at least seem to be methodical in handling this cause we take up first the question relating to the passage of the alleged franchise ordinance, by the council of the village of Montpelier, and under which alleged franchise the defendant company asserts that it has constructed a portion of its plant, and intends to complete the same, and operate said plant under and by virtue of said alleged franchise.

It is admitted by the defendants that said franchise ordinance was not legally *passed* by said council on September 9th, 1913, but defendants strenuously assert that plaintiff can not raise this question. And defendants go further in their contention and say that it is not the *passage of the franchise ordinance* that determines the right of the defendant company to operate its said plant in said village.

The learned judge in the case of *The Paulding Home Telephone Company v. The Paulding Mutual Telephone Association* well said:

“It is well settled that a telephone company gets its right to go upon the streets of a municipality with its poles and wires from the state, and, as well stated in 72 O. S., 532, the power of municipal authorities in the premises is merely to agree upon a mode of use, and if no agreement be made within a reasonable time the company may apply to the probate court, which court shall direct the mode of construction, which shall be such as not to incommode the public in the use of the streets. The right thus conferred by the laws of the state is the right of eminent domain, and involves an attribute of sovereignty. It is conferred upon what are known as public service companies and in the operation of what are known as public utilities.”

This far we partly concur in what the learned judge said, but we do not concur in his reasoning or judgment upon the main proposition involved in that case.

Not only is it true that a public utility, or a private one for that matter, obtains its license and authority to erect its plant in a municipality from the law of the state, but such company also obtains its license or authority to erect its poles and place thereon its wires upon the public highways of the state from the same source of power.

It is the defendant's contention that they obtained their franchise under favor of the provisions of Section 9170 of the General Code, and that under this statute it had a right to go upon the streets and roads by virtue of the provisions of Section 9178 of the General Code, as decided by our Supreme Court, which decision is found in said 72 O. S., that Section 9170 of the code bestows the franchise, and the only point to be determined between the village of Montpelier and the defendant company is the mode of use under the provisions of said Section 9178. It is further contended by defendants, that while it may be admitted said franchise ordinance was not passed by said council as required by the law of the state, yet said franchise takes the form of an agreement or contract entered into between the village authorities and the defendant company, its officers and agents. We are inclined to accept and adopt this theory. We hold the opinion that said franchise ordinance is a resolution, in force

1914.]

Telephone Co. v. Telephone Co.

and effect, or it may be called a proposition submitted by the council of said village on the one hand and accepted by the defendant company on the other, and the defendant company having accepted said proposition, and having acted thereunder by partially erecting and installing its telephone plant in said village, the said franchise ordinance becomes in full force and effect and defendants can not be deprived of the rights and privileges thereunder by any act of the plaintiff or any other person, natural or artificial, save the village authorities themselves, so far as the present rights and interests of the defendant company are concerned. It may be true that the defendant company stands at the mercy of the council of said village relative to said ordinance being repealed, modified or changed, but the plaintiff can have no concern in the destiny of the defendant company. We are inclined to hold and we do hold that said franchise ordinance is one creating a permissive license to the defendant company to go upon the streets of said village, erect and complete its private enterprise, and so long as this license is not revoked it stands in all its legal force and vigor, and protects and shields the defendant company in the operation of its said plant, with as much force and legal effect as if said ordinance had been legally passed by the council of said village.

We come now to discuss the more difficult points that present themselves for determination. The plaintiff vigorously contends that without a franchise the defendant company has no right to construct a telephone plant in said village and use the streets and alleys of said village for the purpose of conducting its business; that if the defendant is a purely mutual company and is not organized and operated for the purpose of serving the public, it has no legal standing, and it can not ask or secure the use of public property for a purely private purpose; and that if the defendant is serving, or "expects" to serve the public as a telephone company it must first obtain a certificate of necessity from the public service commission of the state.

These three several propositions call upon us, among other things, to construe in part the public utilities act of the state

passed May 31st, 1911, and which became operative June 30th, 1911.

This act provides, (a) that a telephone company is a common carrier; (b) Section 4 excepts all public utilities as are operated "not for profit"; (c) Section 54 provides that all telephone companies shall secure a certificate of permission from the public utilities department of the state, when operating, or intending to operate in territory already occupied by a telephone company.

The public utilities commission have decided several times that it does not have jurisdiction over a telephone company organized and incorporated "not for profit."

Many cases may be cited and especially the Farmers' Mutual Telephone Company case, sustaining the contention of the public utilities commission.

The Circuit Court of Morrow County, opinion by Judge Powell, has enunciated this doctrine:

"The construction of a private telephone line and station for the use of a number of persons associated together for that purpose does not constitute a public utility, nor are persons so using such a line subject to control by the public service commission." *Brownsville Telephone Company v. Brownsville Farmers' Telephone Co.*, 15 C.C.(N.S.), 508, affirming 13 N.P.(U.S.), 429.

This same doctrine was announced by the circuit court, Third Circuit, Kinder and Crow, Judges (Donnelly dissenting).

In the case of *Paulding Tel. Co. v. Paulding Mutual Tel. Association*, Matthias, Judge, said:

"The defendant is either a public utility or a private enterprise. If the former, unquestionably the public service commission has jurisdiction and it can not proceed until it shall have secured from the commission a proper certificate; if the latter, it does not possess the power of eminent domain, which is essential before it can appropriate to its use the streets, alleys and public ways of said village."

While we hold in highest respect the decision of Judge Matthias in the Paulding county case, yet we are unable to find our-

selves concurring in that decision; we fancy that the learned judge drifted away from the real spirit and reason of the public utilities act and entered that mysterious region, boundless in its extent, and known as "eminent domain." We are inclined to believe that eminent domain has nothing whatever to do with the rights, privileges and destinies of mutual telephone companies in our state. No company or association is attempting, so far as this case is concerned, to condemn or appropriate in the legal sense any public property of any municipality. The defendant company was given merely a permissive grant or license, by the mutual acts of the council of said village and said defendants, to operate a private utility, enterprise, association, or whatever we may call it, in the village of Montpelier, and the territory adjacent thereto.

The fountain or source of power delegated to telephone companies to use the streets of municipalities, byways and highways of the state for telephonic purposes, is the statute law of the commonwealth and no question of eminent domain can enter into a consideration of the questions arising in this case.

The doctrine of "eminent domain" is imbued with the inherent power to condemn private property for public purposes. No one is contending here that either a public or private telephone company in this state can condemn public or private property, and thus by appropriation brought about by condemnation, compel a municipality to permit such company to enter its domain for the purpose of operating a public or private utility. We have said that telephone companies, organized for profit and not for profit, get their authority to erect poles, string wires thereon, establish an exchange and system of telephonic communication for patrons, from the original source, being the sections of the code referred to herein. If the council of a municipality refuse to grant a privilege by ordinance or resolution, to a telephone company to enter upon the streets and alleys of such municipality and do business therein, then such company, whether public or private in its character, is powerless so to enter such municipality for any purpose except as herein-

after stated. If the council of a village or city can not agree with the company or association of persons who seek to obtain a franchise to establish a telephone system within the limits of such city or village as to the mode and manner of operation of such enterprise, then the parties in interest are relegated to secure their rights by action of the probate court of the said county; all this is a wise provision created by said act of the General Assembly of our state. Certain it is that the provision of the law relative to redress to be secured by action and proceedings in the probate court of the county, relates only to instances where the council of the village and the telephone company are unable to agree as to the use and mode of operation of such company; if the council of said municipality should act arbitrarily in such matters, then the law sends all parties in interest into the probate court of the county for redress remedy and relief. We can not conceive how the doctrine of "eminent domain," which is said to imply an "attribute of sovereignty" can have anything to do with a solution of the main problem involved in this legal battle between two contending forces. Unconsciously we are led to believe that the rights, privileges and immunities of the defendant company rest upon and abide with the equitable doctrine of permissive license. We are admonished, intuitively, that so long as we keep "on the grass" and do take a flight in a "legal aeroplane" and sail above the clouds, we shall come nearer to a common sense solution of all the questions involved in this important law suit.

A license may be briefly defined as follows. "To grant authority to do an act which, without such authority, would be illegal or inadmissible; remove restriction from by a grant of permission; authorize to act in a particular character, as to license a man to keep an inn; to license a physician to practice his profession upon a sick and suffering public; or to license a lawyer to practice his profession." We have known municipalities in this state to grant, by resolution, enacted by councils licenses to peanut venders and to proprietors of stalls wherein may be plied the art of shining shoes for the public. We imagine that courts

1914.]

Telephone Co. v. Telephone Co.

may take judicial notice of the fact that licenses of the kind mentioned and various other kinds are granted by every municipality of the state, wherein the needs of the people require such things.

Coming now to consider briefly some of the cases cited by counsel upon either side of the controversy we take up first the so-called Paulding county case, and without consuming more time we pass it having already indicated our inability to concur in the reasoning and judgment of the learned judge who decided the case.

Next we say a word about the case of *New Ashley Telephone Company v. Ashley Tri-County Mutual Telephone Company*. This case was decided by Fulton, Judge, who having carefully embodied in his decision all the pleadings and points filed and raised in that case, followed the decision of Judge Matthais in the Paulding county case. The case of the *Morrow County Telephone Company v. Marengo Mutual Telephone Company*, is one decided by Judge Mansfield of the Common Pleas Court of Morrow County. It appears from the record in this case that the defendant company through its officers failed to answer fully certain interrogatories submitted to it by counsel for plaintiff. Judge Mansfield says in his opinion that defendants sought to evade full and true answers to interrogatories as to whether defendant company was one organized for profit, and to be conducted for profit, or not for profit, and it appears from the record of that case that the question as to the character of the defendant was the salient point at issue, and the judge held that defendant, having been given an opportunity to make full and complete disclosure as to its real character, evaded the questions and did not fully disclose its character. The court found, properly, that the burden of proof as to the character of the defendant rested with the defendant and that upon this point the defendant failed to remove the burden of proof and sustain its contention that it was a company organized "not for profit," and a decree was entered in favor of the plaintiff. There was no attack made in that case against the right of the council of the

village of Marengo to grant a franchise to the defendant company.

In the instant case we have decided that the defendant company has sustained its contention that it is an association or co-partnership organized and to be operated as a telephone company "not for profit."

The court of appeals in the Morrow county case affirmed the lower court, and in the opinion we discover this dictum:

"Inasmuch as the defendant company seeks to obtain the advantage of an exception in the public utilities act, the burden of proof rests upon it to bring its case within that exception and show affirmatively that its business is actually carried on not for profit. We think upon the whole evidence no such showing is made. We think therefore it follows that the defendant company has no right to establish and operate an exchange in the village of Marengo as against the plaintiff company, without first having obtained a certificate of authority therefor from the public utilities commission."

It will be seen from the foregoing that this Morrow county case does not decide any question involved in the instant case.

In the case of *Jackson Center Telephone Company v. Farmers' Telephone Company*, decided March 14th, 1914, by the Court of Appeals of Shelby County, we find that the point involved and decided by that court in that case was whether a telephone company organized prior to June 30th, 1911, being the date that the public utilities act became operative, and which company having engaged in business in a municipality prior to said date, could extend its lines into other and adjoining territory after said date. The public utilities act itself exempts telephone companies, organized prior to said last named date, from the operation of the act. The court held that telephone companies organized prior to June 30th, 1911, could extend their lines and business to and within the scope of their primary and secondary franchises, so held, without securing a certificate from the public utilities commission, but that such companies could not extend their line into

1914.]

Telephone Co. v. Telephone Co.

new and "undiscovered" territory. Some question was raised in this case as to whether the defendant company was a public service corporation. The court held it was from the nature of its charter, but did not pass upon the question as to whether the defendant was a company organized for profit or not for profit.

The case of *Ada Telephone Company v. Dunkirk Mutual Telephone Company*, cited by counsel for defendant, is almost parallel in many ways with the instant case. The petition in that case is very like the one in the instant case. The answer is more brief than that in the case we are considering. The pleadings however in that case raise the very issues raised in this case, and the right of said village to enact such ordinance was attacked for fraud and otherwise by the plaintiff company. The main point however determined by the common pleas court and the Court of Appeals of Hardin county is whether it was incumbent upon the defendant company to obtain a certificate from the public utilities commission of the state granting it the authority to do business as a *privae* utility. Quoting the brief opinion of the court of appeals we read:

"It clearly appears that the telephone plant of defendant is a utility, operated not for profit, and therefor defendant is not a public utility within the intent of said Section 614-2a, General Code. Hence the operation of said plant in the manner disclosed by the evidence adduced, does not subject defendant to the jurisdiction of the public service commission of Ohio, provided for by Sections 614-1 to 614-82, General Code."

We think this case is decisive of the one at bar. The court of appeals of the third circuit having affirmed the lower court upon every point raised by counsel upon either side, it follows that the decision of Matthais, Judge, in the Paulding county case and that by Fulton, Judge, in *New Ashley Telephone Company v. Ashley Tri-County Mutual Telephone Company*, are overruled.

The term "public utility" as used in the so-called public utilities act shall mean and include every corporation, company, co-partnership, person or association, defined in the preceding

section, except such public utilities as operate their utilities not for profit. Any person or persons, firm or firms, co-partnership or voluntary association, when engaged in the business of transmitting to, from, through, or in this state telephone messages, is a telephone company and as such is declared to be a common carrier as defined in Section 614-2 of the General Code.

Can it be said, and maintained successfully, that the plaintiff has an exclusive right to the streets and alleys in the village of Montpelier for telephone purposes? We think not. The plaintiff does not claim or assert any such right, and if we recall correctly, no exclusive franchise in Ohio can be granted to any corporation, firms or persons. What is the policy and purpose of the public utilities act? Is it not regulatory in its operation? We answer in the affirmative. We have in existence in Ohio two great classes or kinds of public utilities; one is organized and operated for profit; the other not for profit. Which of these two classes or kinds of public utilities does the public utilities commission of our state exercise control and jurisdiction over? You answer of course the one for profit. Why? Because we know that "In the corrupted currents of this world offenses' gilded hand may shove by justice; and oft 'tis seen the wicked prize itself buys out the law." And so it has come to pass after many years of ceaseless struggle by the people, laws have been enacted to curb and control corporations, created for profit. A little association of people, a copartnership if you please, organized and existing for a purpose other than that of profit, needs no curbing or controlling. Not many years ago there was a time when a cry rent the air, which came from independent telephone companies, protesting against the Central Union Telephone Company as constituting a giant trust and monopoly. These little independent telephone companies have outgrown their swaddling clothes, and having assumed mighty proportions, now parade before the people the same "spectre" that the Central Union Telephone Company flaunted in their face but a brief time since. The overshadowing policy of the public utilities law is to regulate the rate of charges and to fix schedules

1914.]

Telephone Co. v. Telephone Co.

of prices of telephone companies and other corporations, doing business in this state for profit. No utility or corporation in Ohio in these days of evolution and progress can form or create a trust or combination in restraint of trade. No utility, which term includes all classes of corporations and combinations, can increase, or, I take it, decrease its capital stock or amount of bonds without getting a certificate of permission so to do of and from the public utilities commission of the state. All this may be said to be a protection to the people against oppression and unfair and unjust actions on the part of public utilities created and operated for profit, and to avert a flood that might come from "watered stock."

The public utilities commission of Ohio has said to the defendants by its letter introduced upon the trial, that it has no control over its interests, or its destiny. This being true does it not follow, as the night the day, that the defendants, and those whom they seek to give the right to enjoy the fruits and benefits of a somewhat modern invention, can accept the invitation, to place in their homes and places of business a telephone? Must many thousands of people of all classes be deprived of this service because to bestow upon them the privilege many of their neighbors enjoy, a war of competition might arise in the community? Are the farmers of this state to be shackled in the enjoyment of a common necessity, because forsooth some telephone corporation, existing and operating for profit in the community, might be met with competition? Because dividends might be impaired and lessened? Who is there among us that will answer these questions in the affirmative? This court is one that will not venture so to make answer, and we assume much solace in going upon record as being opposed to any law that curbs and stifles competition, or works in restraint of trade or commerce. For many years the people of our commonwealth, as well as those of the nation, have been fighting a battle of freedom, and against oppression, seeking to immure themselves from the encroachments that have been forged upon them by corporations, seeking to compel the people "to pay the price."

It seems to us that the time is ripe when every citizen of this land ought to have the inalienable right, not only to "worship God according to the dictates of his own conscience," but, also to enjoy every privilege and immunity that may be enjoyed by any other citizen of the community. Is there any law of the land that forbids or prohibits a peaceful, law abiding citizenship from colonizing its best interests, and mutually agreeing to band themselves together as an association of persons and own and operate a mutual telephone company, or a mutual insurance company, or any other kind of a mutual company? We know of no such law, and if such existed, we would not follow it, for the great law of our Creator rises higher in the scale of justice and human liberty than any "man-made-law" of any land.

It seems to us that the central question involved in this legal battle is one of equality upon the one hand and money upon the other. More than a century ago a little band of lovers of liberty fled to the shores of this Republic and colonized themselves into a band of Christian, God-fearing people; they left a land of oppression and came to build up a land of freedom. Since that time evolution has worked wondrous changes. We now live in a land of liberty and plenty. Every man is equal before the law. This great doctrine of "equality" is not founded alone upon the written or unwritten law of our land, but it was promulgated nearly two thousand years ago by that Man whose sore and weary feet were washed by the waves that lashed the shores of Galilee. And, so, it has come to pass through years of progress that a farmer who toils and sweats upon his broad acres, is just as good as any man who does not so toil and sweat.

Coming quite abruptly to conclude this somewhat laborious and extended effort we hold:

1st. That the alleged franchise ordinance of the village of Montpelier, although not legally passed, yet the same by its terms and conditions granted to the defendant company, its officers and agents a permissive license to enter upon the streets and alleys of that municipality, erect its poles, string its wires and establish its central office and exchange in said village.

1914.]

Reynard v. Telephone Co.

2d. That the defendant company is a mutual telephone company, organized, existing and to be operated in the future as a utility not for profit.

3d. That, being such mutual company, it does not come within the control or jurisdiction of the public utilities commission of Ohio, and that it is entitled to operate its plant, without its first having obtained a certificate of necessity from said public utilities commission of the state.

4th. That, being such mutual telephone company, operating and intending to operate not for profit, it is such a creature of the law as that the council of said village of Montpelier had a legal right to grant to it a permissive license, to do the things mentioned and set forth in the ordinance of said village.

Decree accordingly.

RIGHT OF TELEPHONE COMPANY TO TRIM TREES ON LAND OF ABUTTING OWNER.

Common Pleas Court of Licking County.

A. R. REYNARD V. UTICA & HOMER TELEPHONE CO.

Decided, April Term, 1913.

Shade Trees—May Not be Trimmed or Interfered with by Telephone Company—Rights of Company where Its Poles are in Position.

Where the land of an abutting owner extends to the middle of the highway, a telephone company may be enjoined from maintaining its line of poles in front of said property or from trimming the trees along said line, where the poles were placed there without first obtaining the written consent of the owner or making compensation to him, if the possession of the company has continued for less than twenty-one years.

Carl Norpell, for plaintiff.

Kibler & Kibler, contra.

FULTON, J. (orally).

This case was heard upon its merits, a temporary restraining order having been heretofore granted in which the defendant was restrained from moving its line of poles and wires further north or nearer the line between said plaintiff's premises and the public highway, and from trimming or interfering with the line of shade trees in front of plaintiff's house, and from operating said line of telephone poles along said plaintiff's premises without compensating plaintiff therefor.

The testimony shows that plaintiff has trees in front of his house, which would be in the line of the highway if the fence of his yard is removed north seven and one-half feet. It is claimed the fence has been ordered to be moved by the commissioners who are improving said highway by grading, graveling, and so forth.

The evidence shows that this fence has been where it is now located, from thirty to fifty years; that these trees were planted by the plaintiff for the purposes of furnishing shade for his house, and that they are now about nineteen years old, except a walnut tree, which the defendant did not plant, and which is very much older.

This telephone line was placed in front of plaintiff's premises some thirteen or fourteen years ago, but according to the testimony, it was done without the written consent of said plaintiff.

These trees are hard maple trees, or what are commonly known as sugar trees, of slow growth, very ample width, thick foliage and close limbed.

The court finds from the evidence that plaintiff's line extends to the center of the road and that these trees are upon plaintiff's land.

What is the law applicable to these facts? It seems to the court that this case has been settled and determined by the case in 51 O. S., page 348.

The court finds the law to be that, without the written consent of the plaintiff, the possession of the telephone company would not ripen into a right until the same had been occupied for the

1914.]

Reynard v. Telephone Co.

period of twenty-one years, and as the testimony in this case shows that this line was first constructed about thirteen or fourteen years ago, it follows that the telephone company has no lawful right to have its line and poles on the property of the plaintiff.

The court further finds that the commissioners of the county granted to the telephone company the right to erect their poles along this road, but without the written consent of the plaintiff, and unless the same has been occupied for the period of twenty-one years, the court holds this would not give the telephone company the right to enter upon the premises of the plaintiff without first making him compensation therefor.

As it is not claimed in this case that any written consent was obtained from, or any compensation has been made to, plaintiff and as the court finds the law to be as above stated, the court makes the temporary order heretofore made in this case permanent.

LIABILITY FOR INJURY TO LIVE STOCK IN TRANSIT.

Common Pleas Court of Cuyahoga County.

ARION L. THOMAS v. THE BALTIMORE & OHIO RAILROAD COMPANY.

Decided, July 28, 1914.

Railways—Limitation of Carrier's Liability Void, When—Void Clauses Do Not Render Entire Shipping Contract Void—Negligence of Shipper of Horses Defeats Recovery for Loss Sustained.

1. A shipper of horses by rail is not bound by a special exemption clause in the contract of shipment, limiting the value of each animal to one hundred dollars, but he may show that the real value of an animal injured or killed in transit was more than one hundred dollars, if such be the fact.
2. A shipper who crowds twenty-one horses into a car, and finds upon arrival at destination that one of them has been so injured that it is necessary to kill it, can not recover one hundred dollars or any other sum from the carrier, in the absence of any showing of negligence on its part.
3. Failure to file a claim for damages on account of such loss for more than eight months after its occurrence constitutes a bar to recovery thereon under the provisions of the shipping contract in this case.

Hart, Canfield & Croke, for plaintiff.

White, Johnson, Cannon & Neff, contra.

FORAN, J.

October 11, 1912. the plaintiff, Arion L. Thomas, filed a statement of claim against the defendant, the Baltimore & Ohio Railroad Company, in the municipal court of the city of Cleveland, Ohio, alleging that the defendant is a corporation doing business in Ohio, and is a common carrier; that on February 1, 1912, he shipped over the defendant's road twenty-one horses, and while said horses were in possession and control of the defendant the back of one of the horses, and which was sound and in good condition when placed on the car, was broken through the carelessness and negligence of the defendant company, to

1914.]

Thomas v. Railway.

his damage in the sum of \$100. The case was tried to the court and judgment rendered in favor of the plaintiff for said sum of \$100. The defendant filed a motion for new trial, which was overruled, to which action of the court in overruling the said motion, the defendant excepted and prosecutes error to this court to reverse said judgment of the municipal court. The parties will be treated here in the same relation in which they stood in the court below. It does not appear that the defendant filed a statement of defense. In the petition in error the defendant states seven grounds of error. The fifth that "the judgment of the court is contrary to the weight of the evidence and contrary to law" will only be considered. From the record it appears that the plaintiff's evidence was confined solely to his own testimony—no other witness in his behalf being called. Substantially the plaintiff's evidence is to the effect that he purchased the horses from the Riverside Horse & Mule Company of Pittsburgh, Pa., for the Cleveland market; on or about February 1, 1912, he helped to load the horses on a stock car of the Baltimore & Ohio Railroad Company; that there were twenty-one horses so loaded and shipped to Cleveland, Ohio; that when the car containing these horses reached Cleveland one of the horses was injured; that its back was broken and it had to be killed; that the value of the horse so injured and killed was \$100, and further that he had employed no one to accompany the horses to Cleveland and did not do so himself. Although the plaintiff in his statement of claim alleges that the horse had his back broken through the carelessness and negligence of the defendant, he tendered no evidence in support of this claim. He relied wholly upon the implied contract of indemnity arising from the common law doctrine of the carrier's engagement to the public.

It is undoubtedly well settled that at common law a common carrier is bound to deliver the goods that have been entrusted to him, or their value; and he can only justify or excuse a default where a loss occurred by an act of God, by public enemies, the conduct of the shipper, by the inherent nature of

the goods, or unless special exemption has been agreed upon by contract, the terms of which are not against public policy. This is not strictly speaking a common law doctrine, for the law that makes a common carrier an insurer, and his engagement to the public a contract of indemnity, is founded on the Praetorian edict of the civil law found in the ninth title of the fourth book of the Pandict. This rule, sweeping away all secondary questions as to the conditions of culpability on part of the carrier, through or under which loss or damage may have occurred, has necessarily undergone considerable modification by reason of changing conditions in modes of transportation and the character of things or goods transported.

At the conclusion of the plaintiff's testimony the defendant interposed a motion for judgment for the defendant, which motion the court overruled. This ruling of the court was proper as a *prima facie* case had been presented. The allegation of the plaintiff that the loss was due to the carelessness and negligence of the defendant might properly be treated as mere surplusage. The burden is upon the defendant to show, under the general rule, that that loss was due to an act of God, public enemies, conduct of the shipper, or that exemption had been agreed upon by contract between the parties. The question whether the burden was upon the defendant to show that the loss was due to the inherent nature or character of the shipment is not so well established.

The testimony of the defendant, as disclosed by the record, conclusively establishes: first, that the horses were shipped on the 31st day of January, 1912, at the Alleghany, Pa., station of the defendant by the Riverside Horse & Mule Co. as shipper or consignor, consigned to E. L. Thomas, Cleveland, Ohio, as consignee; second, that on the day of the shipment the consignor, the Riverside Horse & Mule Company, and the defendant carrier, the Baltimore and Ohio Railroad Company, entered into a contract for this shipment, and signed, by its duly authorized agent, a usual standard uniform live stock contract, which was also signed by the Riverside Horse & Mule Company, by its agent.

1914.]

Thomas v. Railway.

one Samuel West, in the presence of and witnessed by one W. L. Dawson, an agent of the defendant; third, that the consignor, the Riverside Horse & Mule Company, sent with the horses, as caretaker thereof, one Edward Jones; that on the back of the contract appears this stipulation:

“Release for man or men in charge.

“In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in the said contract, of which live stock I am in charge, the undersigned does hereby voluntarily assume all risk of accident or damage to my person or property, and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employes or otherwise.

“(Signed) EDWARD L. JONES,
Signature of man in charge.

“(Signed) W. L. DAWSON, Witness.”

The plaintiff claims he had no knowledge of the fact that Edward Jones accompanied the horses to Cleveland, Ohio, but that the said Jones did so, and that he performed the usual duties pertaining to caretaker of the horses, clearly appears from the defendant's evidence. The plaintiff did testify that he helped load these horses at Alleghany, Pa.; and while it is true that title to the goods passes to the purchaser upon delivery to the carrier (*State v. Mullen*, 78 O. S., 358), yet it is undoubtedly true that the Riverside Horse & Mule Company, from whom the plaintiff purchased the horses, was the agent of the plaintiff in making this shipment and signing the contract. Either this, or the plaintiff, as a matter of convenience, had the Riverside Horse & Mule Company act as consignor in order to avoid appearing as both consignor and consignee himself. In any event it will be held that the plaintiff having admitted he was present

and helped to load the horses, he knew that the Riverside Horse & Mule Company signed this contract in his behalf, and was acting as his agent in so doing, as the defendant in no event would receive the horses unless its freight was paid or secured, or it knew from whom the horses were received and to whom they were consigned. The contract contains the following stipulations:

First. "That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of per, which is the lower published tariff rate based upon the expressed condition that the carrier assumes liability on the said live stock to the extent only of the following *agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals*, and beyond which valuation neither the said carrier nor any connecting carriers shall be liable in any event, whether the loss or damage occur through negligence of the said carrier or connecting carriers or their employes or otherwise. If horses or mules—not exceeding one hundred dollars each."

Second. "The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock occasioned by any or either of the following causes, to-wit: Over-loading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold, or by changes in weather, or for delay caused by stress of weather, obstruction of tracks, by riots, strikes, or stoppage of labor or causes beyond their control."

By the first stipulation the defendant seeks to procure exemption from responsibility for loss arising from its own acts of negligence as a common carrier, and to that extent it is, therefore, contrary to public policy, void, and of no effect (*Welch v. Railroad Company*, 10 O. S., 68); but as this stipulation only fixes the damages in case of loss at \$100 for each horse, and as the plaintiff only claims \$100 damage for the horse injured and lost, this stipulation is immaterial and does not affect the question of liability. The plaintiff was not bound by this paragraph of the contract of special exemption, and might have shown the value of the horse was more than \$100,

1914.]

Thomas v. Railway.

if in fact the value was greater. In other words, he could show the real value of the horse and recover therefor provided the defendant was liable for the loss. The second paragraph or stipulation of the contract which is a contract of special exemption from responsibility for loss arising from over-loading, crowding one upon another, kicking or goring, suffocating, fright, heat, cold, or by change in weather, or for causes beyond their control, does not, in our opinion, fall within the inhibition of being against public policy. The clause in this stipulation, "or fire from any cause whatever," is obnoxious to the rule, as fire, if one had occurred, might be due to the negligence of the defendant; but as the loss did not occur through fire, we are not concerned with this clause in the stipulation. We hold, however, that the defendant had a right to contract for exemption from liability for over-loading, crowding one upon another, kicking, suffocating, fright, cold, heat, change in weather, or for loss from any cause beyond the control of the carrier. By the use of the words "or for causes beyond their control," the defendant did not seek to procure exemption from responsibility for loss arising from its own acts of negligence, or failure to perform the duties incident to its employment as a common carrier. That liability of the carrier may be qualified and limited by special contract is well settled in Ohio and elsewhere. *Davidson v. Graham*, 2 O. S., 131.

In *Graham & Co. Davis & Co.*, 4 O. S., 362, it is said in the syllabus that:

"A common carrier, by special contract with the owner of goods intrusted to him, may so far restrict his common-law liability as to exonerate himself from losses arising from causes over which he had no control, and to which his own fault or negligence in no way contributed."

To what extent, however, this exemption from liability may be provided for by special contract between the parties is a question upon which the authorities are not fully agreed. In England the authorities seem to hold that the carrier may stipulate for exemption from all liability, even for gross negligence or positive misfeasance.

In *Halseapple v. Rome, etc., Ry. Co.*, 86 N. Y., 275, a stipulation specifically and in express terms exempting the carrier from liability, although due to the carrier's negligence, is held valid and binding. This is not the law, however, in Ohio. In most states the right of the carrier to, by special contract, exempt itself from liability, is more liberally construed than in this state.

In *Welch v. Railroad Company*, 10 O. S., Scott, J., says, page 72:

"But in this country, whilst the right of a carrier is generally recognized to contract for exemption from that extraordinary responsibility imposed by the common law; which makes him an insurer, yet the validity of contracts providing for exemption from liability for his own misfeasance or gross negligence, has been frequently, if not generally, denied, upon grounds of public policy."

The doctrine of this case as laid down in the syllabus is:

"A railroad company, acting as a common carrier of live stock, can not, by a special contract, procure exemption from responsibility for losses arising from its own neglect of the duties incident to such employment."

See also *Railway Company v. Sheppard*, 56 O. S., 68.

Again in this case on page 74 the court say:

"He can not stipulate for a less degree of care and diligence, in the discharge of his duty, than that which pertains to his trust as a bailee for hire."

The law is well settled that the degree of care and diligence required of a bailee for hire is that which a prudent man would use and exercise towards his own property. The contract contains this further stipulation:

"That the said shipper is at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported * * * and to unload the same, and neither said carrier nor any connecting carrier, is to be under any liability or duty with reference thereto except in actual transportation of the same."

1914.]

Thomas v. Railway.

Plaintiff testified that he helped to load the horses on the car and that he unloaded them. He knew just how they were loaded, and as he contracted to load and unload them, he can not blame the carrier if they were crowded or if too many horses were placed in the car. Nowhere in the record does it appear that the carrier was in the slightest degree negligent. The car came through on schedule time. No fault is found with the car itself, that is, the car in which the horses were loaded. There is no evidence that there was any unusual switching or bumping of the cars, or that the train was anywhere uncoupled, side-tracked, or subjected to any unusual condition, stress, or strain; indeed, the record is as silent as the grave as to a single act of negligence on the part of the defendant. The plaintiff relies solely and wholly upon the theory, that having placed the horse in the car at Alleghany, Pa., he was entitled to the horse in the same condition it was when he loaded it or its value at Cleveland, and yet the contract provides that the defendant shall not be liable for loss arising from causes beyond its control, and this provision, or one similar thereto, has been usually held valid. In *Davidson v. Graham*, 2 O. S., 131, *supra*, a contract which exempted the defendant from liability for the dangers of river, fire, and unavoidable accident, was held valid. There being no evidence as to how the horse was injured, it must be presumed the injury was the result of unavoidable accident, and as the contract in this case exempts the defendant from liability "for causes beyond their control," it can not be held liable for such accident.

The Legislature, in the enactment of Section 8993-2, G. C., passed in 1912, seems to have had in view the doctrine enunciated by Judge Scott in *Welch v. Railroad Company*, *supra*, for this section provides:

"A carrier may insert in a bill issued by him any other terms and conditions provided that such terms and conditions shall not (a) be contrary to law or public policy; or (b) in any wise impair his obligation to exercise at least that degree of care in the transportation and safe-keeping of the goods entrusted to him, which a reasonably careful man would exercise in regard to similar goods of his own."

This is exactly the degree of care required of a bailee for hire. If a carrier seeks to relieve himself from liability by reason of a valid agreement limiting his liability, the burden on him is to show that the loss was due to one of the exceptions contained in the contract, and that such carrier was free from negligence. 2 O. S., 131; 4 O. S., 362; 26 O. S., 595; 28 O. S., 144; 28 O. S., 418.

The burden is on the carrier to show, not just how the loss occurred, but the burden is on him to show that it was not due to any fault or negligence of the carrier. In the nature of things, it may not be possible to show by affirmative proof just how the loss occurred, but when the carrier does show that there was no defect in the car, as was shown in this case, and that there was no negligence in the operation of the train while en route, and that there was no negligence in any respect by its employees, it must follow inevitably that the loss occurred from causes beyond its control. While it is true that stipulations varying or limiting the liability of the carrier must be strictly construed (*Paddock v. Railroad Company*, 21 O. C. C., 626), yet where injuries to live stock in transit are such that they are as likely to have been caused by the nature of the animals as by the negligence of the carrier, the court can not assume the injuries were caused by the negligence of the carrier. *Lewis v. Penna. Railroad Co.*, 70 N. J. L., 132; 56 A. T. L., 128, affirmed 59 A. T. L., 1117; 71 N. J. L., 339.

If there is a conflict of evidence, or if more than one conclusion can fairly be drawn from the facts, the question as to how the loss or injury was caused is fairly one for the jury to determine from all the facts and circumstances of the case. *Estill v. N. Y., etc., R. Co.*, 147 U. S., 591; *St. Louis, etc., R. Co. v. Weakly*, 50 Ark., 397; *Ball v. Wabash, etc., R. Co.*, 83 Mo., 574.

The preponderance of the testimony in the case before us clearly shows that the injured horse was an old, bony, weak, ill-conditioned animal. The car was closely packed, there being twenty-one horses standing side by side, each taking three or more feet of space, and under the circumstances, it was undoubtedly a question of the survival of the fittest. Besides, the

1914.]

Thomas v. Railway.

contract provides that the owner should care for the horses en route, and the evidence shows that a man actually was sent along with the consignment for that purpose. As has been said plaintiff testified that he helped to load and unload the animals, and under such circumstances the authorities hold that the burden was on him to show the negligence of the carrier was the proximate cause of the injury. *Louisville, etc., R. Co. v. Harned*, 23 Ky. L. Rep., 1651; *Needy v. Western Maryland R. Co.*, 22 Pa. Supr. Ct., 489; *Cleveland, etc., R. Co. v. Crawford*, 24 O. S., 631; *Chicago, etc., R. Co. v. Carey*, 115 Ill., 115.

The carrier is relieved from liability or responsibility upon proof that it has provided suitable means of transportation and has exercised the degree of care which the nature of the property requires, as the presumption then arises that the animals were injured by reason of their inherent nature. *Hayman v. Philadelphia, etc., R. Co.*, 8 St. Rep. (N. Y.), 86; 54 N. Y. Sup., 158; 60 Miss., 1017; 66 Miss., 319.

If, however, the carrier fails to show that it has provided suitable means of transportation, and has failed to show that it exercised that degree of care which the nature of the property requires, the burden is on the carrier to prove affirmatively that the injury and loss occurred through the inherent nature or proper vice of the animals. *Fort Worth, etc., R. Co. v. Great-house*, 82 Tex., 104.

It is claimed, however, that this doctrine is not the law in Ohio, and *William v. Hamilton*, 4 O. S., 723, is cited in support of the proposition. We think the doctrine of this case is largely misunderstood. The real question decided by this case is that a ferryman occupying a position in a line of public travel, and holding himself out for general employment, is a common carrier; in other words, that the doctrine of common carrier is extended to ferrymen. The case is largely cited by courts and text-writers, always in support of the proposition that ferrymen are common carriers. The facts of the case clearly show that the horses of the plaintiff were lost through the gross negligence of the ferryman in not providing a gate or bars so as

to prevent the animals or horses from walking off of the ferry when the machinery was started and they were necessarily frightened thereby. In the syllabus it is said, in speaking of the ferryman, "that his responsibility for the safe delivery of living animals transported by him is the same as that in relation to the carriage of other property"; but the case does not contravene the proposition that a carrier may be exempt from liability because of the inherent character or nature of the freight or goods carried by him.

In the case of *American Express Company v. Smith*, 33 O. S., 511, it is said in the syllabus:

"A common carrier is not responsible for the loss of perishable property when that loss arises from the nature of the property itself."

The doctrine of exemption from liability because of the inherent nature or character of the property is so well established that it is hardly necessary to cite authorities in support of it. Even in the case of *Wilson v. Hamilton*, 4 O. S., *supra*, on page 742, Judge Ranney, discussing the claims of the defendant that the loss resulted because one of the horses was particularly vicious and had been frightened shortly before coming upon the boat by a train of cars, said:

"That these facts should, in good faith, have been communicated to the defendant; and that the plaintiff did not, in all respects, conduct himself properly at the time the accident happened. In our opinion, no part of this claim is sustained by the evidence. There is nothing to show that the horse was *vicious*. The greatest sin proved upon him is, that he was spirited."

The utmost to which the learned judge carried the doctrine in this case was, that if a horse was vicious, that fact, in good faith, should have been communicated to the carrier so that the carrier might take the necessary precautions to provide for his safe-keeping; but this doctrine does not apply to a case where the owner of the cattle accompanies the cattle himself and becomes responsible for their care and maintenance while en route

1914.]

Thomas v. Railway.

or in transit. That the doctrine of non-liability because of the inherent nature of goods is sound, must be admitted. Suppose a horse in transit becomes sick and dies through no fault of the carrier. Upon what principle of law should the carrier be held liable? The germs of the disease may have been in the animal before he was placed on the car. The heat, confinement, crowding, fright, want of water, and the unusual change of environment, may have caused the sickness and death. A man shipping, say, bananas from New York to Cleveland, may not be able to procure a refrigerator car and ships them in an ordinary car, and the temperature increases very largely before the car reaches Cleveland, and because of the rise in temperature the fruit is destroyed. Would the carrier be responsible? It would not be necessary in such case to say that he was relieved from responsibility by act of God, for the increase of temperature would not fall within that doctrine, as everybody must expect and anticipate such temperature as is ordinarily usual in a certain climate and latitude.

In *Schoenfeld v. Louisville & N. R. Co.*, 49 La. Ann., 907, it was held that a carrier is not liable for the loss of a horse through sickness where it did not appear that the sickness was caused by the negligence of the carrier. The plaintiff claims he had no knowledge of the fact that the Riverside Horse & Mule Company sent a man with the horses, and yet his contract provided he should do so, else how should they have been fed and watered while in transit. If the owner of live stock place too many animals in a car, and they are injured by overcrowding, he can not recover (*Texas & P. Ry. Co. v. Edins*, 36 Tex. Civ. App., 639); or if he fails to accompany the stock when he has especially contracted to do so, and to water and feed the animals, and damage results from this failure on his part, he can not recover. *Cent. of Ga. Ry. Co. v. James*, 117 Ga., 832; *Chicago, etc., R. Co. v. Schuldt* (Neb.), 92 N. W., 162.

Carriers do not absolutely warrant live stock against the consequences of their own vitality, if the carriers are in all respects free from negligence in providing suitable cars and in the mode and manner of transportation. In the case before us,

however, apparently the trouble was not with the vitality of the animal, but the testimony seems to indicate that the trouble arose from lack of vitality in the animal. See *St. Louis, etc., R. Co. v. Franklin*, 123 S. W., 1150. Transporting horses in cars propelled by steam power, places them in an environment so opposed to their natural habits and instincts that they may refuse to eat, die of fright or injure and destroy themselves in various ways, notwithstanding every possible precaution and foresight to prevent it, and if they are accompanied by the owner, or by his servant or agent, and the carrier exercises all the care and caution that the circumstances require, it would be unreasonable in the highest degree to charge him with the loss. *Clark v. Rochester, etc., R. Co.*, 14 N. Y., 570; *Evan v. Fitchburg R. Co.*, 111 Mass., 142.

In Kentucky it is held that a railroad company carrying live stock is liable for negligence, but is not an insurer. *Louisville, etc., R. Co. v. Harned*, 23 Ky. L. Rep., 1651.

In *Yazoo R. Co. v. Pope*, 61 So., 450, it is held that the carrier is not liable for injury to mules en route if no accident happened to the train, and it was properly handled, and the car in which the mules were being transported was properly equipped.

In view of the great weight of authority on the question before us, we can come to no conclusion but that the judgment of the municipal court is contrary to law and the evidence as disclosed by the record. But there is another question not presented by counsel for defendant which we think decisive of the issues involved in this case. The contract contains this clause or stipulation:

"That no claim for damages which may accrue to said shipper under this contract shall be allowed or paid by the said carrier or sued for in any court by the said shipper unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the Baltimore & Ohio R. R. Company's agent of the said carrier at his office in Cleveland, Ohio, within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like

1914.]

Thomas v. Railway.

manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs."

The record nowhere discloses that this provision of the contract was complied with. No claim was presented, so far as the evidence discloses, until suit was brought in the municipal court October 11, 1912, eight months after the loss for which plaintiff sues. No claim was ever presented in writing, verified by affidavit, to the defendant's agent at Cleveland, Ohio, within five days after the horses were unloaded or at any time.

In *Pennsylvania Company v. Shearer*, 75 O. S., 249, it is said in the syllabus:

"A common carrier and a shipper may, in the absence of fraud, imposition, or deception, enter into a valid and enforceable special agreement requiring the shipper, in case of loss or damage, to make a verified claim for damages in writing, within a specified time, and in default thereof, that the carrier shall not be liable, provided that the period of time within which such claim shall be made is, under all the circumstances of each case, a reasonable one."

When the plaintiff unloaded these cars at Cleveland, he says he examined the horse and claims that its back was broken. He knew then that, if he had a claim against the carrier, it should be presented in accordance with the terms of his contract. He at least knew he sustained the loss through some cause or other, and having waited for over eight months, he will not now be heard to press the claim. The reason for this clause in the contract is manifest and apparent. The carrier had a right to know at the time the horses were unloaded whether the shipper or the consignee intended to present or prefer a claim against it, so that it might ascertain the facts and circumstances, if possible, under which the animal was injured. All of the facts were then fresh in the minds of the agents of the carrier and the person who accompanied the stock from Alleghany as the agent of the shipper, and it is no more than fair that the carrier should then be notified that a claim would be presented, so that it might procure such testimony as then could be procured. Wait-

ing for eight months until the whole matter became vague and indistinct, and witnesses perhaps had disappeared and could not be located, are such laches upon the part of the plaintiff as will bar a recovery in this case.

It may be said that inasmuch as the contract contains certain clauses which are void as being against public policy, that the whole contract is void, but this contention can not be maintained. A shipping contract is based upon a valid consideration. The carrier performs a service, or, agrees to perform a service, for which the shipper agrees to pay, and if the service is performed, the amount agreed upon must be paid by the shipper. The whole consideration, therefore, was lawful; but even when only a part of the consideration is unlawful, the contract may be valid as to the other part. *Doty v. Bank*, 16 O. S., 133.

In *Page on Contracts*, Section 510, the author says:

“Bills of lading otherwise valid, containing covenants void as relieving a common carrier from liability for negligence, are not entirely invalidated thereby, but only such provision is void.”

That is, a provision or provisions which are contrary to public policy are void, but the provisions of the contract that are not contrary to public policy or illegal in any way, being based upon a valid consideration, are enforceable. See *Page on Contracts*, Section 359, under which section all the authorities are collated and cited on the doctrine relating to contracts waiving the performance of duties imposed by law on common carriers.

For the reasons indicated, the judgment of the municipal court will be reversed, and this court, proceeding to render the judgment the municipal court should have rendered, renders judgment for defendants for costs.

1914.]

Mansfield v. Cole.

**POWER OF THE PROBATE COURT OVER ITS OWN
DECREES.**

Common Pleas Court of Cuyahoga County.

J. CLARK MANSFIELD, ADMINISTRATOR, v. ANDREW J. COLE ET AL.*

Decided, June 4, 1914.

*Proceeding to Sell Real Estate to Pay Debts—Erroneous Entry Vacating
Previous Decree—Becomes Binding Through Failure to Appeal—
Terms of Probate Court—Section 11643.*

The administrator of an estate filed his petition in probate court asking leave to sell real estate to pay debts. C filed an answer and cross-petition setting up claim of a lien upon the premises. July 28, 1913, after hearing had, the court found in favor of C, and decree was entered without contest. October 6, property ordered sold at public sale. October 22, by motion with proper notice, A asked leave to be made party defendant; motion granted. November 1, A filed answer and cross-petition setting up a lien by virtue of judgment obtained during lifetime of decedent, upon which levy made upon real estate described in petition. No appeal or error proceeding on order allowing A to become party defendant. Cause set for hearing *de novo*, and decree entered finding A had a first and valid lien, and that C had no lien; order of sale issued. No appeal taken from this order, and no error prosecuted. Property sold at public sale in February, and bought in by A for less than amount of his claim. February 16, the administrator filed motion to confirm sale, also to vacate order of December 29th, and grant rehearing upon all other matters heard at that time. Motion to confirm sale granted by the court, but overruled as to all the rest. To this ruling exceptions taken by administrator and defendants, and appeal taken to common pleas court. *Held:*

1. The action of the probate court in practically vacating the entry of July 28th, by its decision of December 29th, was erroneous. The court was not authorized, under the statutes of this state, *sua sponte* or otherwise, to make the entry or render the judgment and decree of December 29th.
2. As the court had jurisdiction of the subject-matter, the decree of December 29th was not void, but merely voidable, and an appeal would lie from such decision or judgment to the court of common pleas, where the same might have been reversed.

*Affirmed by the Court of Appeals, June 22, 1914; not reported.

3. Having failed to avail themselves of their right of appeal given them by the statute, within the time limited by statute, the defendants can not now complain.
4. The court of common pleas is one of general jurisdiction, having regular terms. The probate court is a court of limited jurisdiction, having only such powers as the statutes confer upon it. The probate court has no regular terms, it being open for business at all times. Such terms as are provided for it by statute are for special purposes only. Therefore it is extremely doubtful whether the doctrine that the court of common pleas, being a court of general jurisdiction, has control over its docket and judgments during the term, applies to the probate court.
5. Section 11643, General Code, does not confer upon a probate court power to hold three regular terms of four months each in each year for all purposes, but only for purposes mentioned as provided for in Chapter VI of Title 4, Division 4, General Code.

Walter C. Ong, for plaintiff.

Tanney & Barber and *O. W. Broadwell*, contra.

FORAN, J.

On July 12, 1913, J. Clark Mansfield, as administrator of the estate of Catherine L. Larned, deceased, filed a petition in the probate court of this county, alleging that the personal estate of the decedent was insufficient to pay the claims or debts against the estate, and that it was necessary to sell certain real property, of which the deceased died seized, for that purpose. Service was waived and appearance entered by the defendants named in the petition, and on July 28th, 1913, the court, after hearing had, found the allegations of the petition were true, and that the allegations in the joint answer and cross-petition of Andrew J. Cole and Emma J. Cole were also true, and that there was due to them from said estate the sum of \$356.75, with interest and costs.

The court further found that the said real estate had theretofore been duly appraised at the sum of \$1,000, and that it would be to the best interest of the decedent's estate to have the same sold at private sale. It was therefore ordered, adjudged and decreed that said real property be sold at private sale, for cash, at not less than the appraised value thereof, and order of sale was accordingly issued, and the same was returned October

1914.]

Mansfield v. Cole.

6, 1913, endorsed "not sold for want of bidders." On the same day, October 6, 1913, the motion of the administrator to advertise and sell at public sale was granted and allowed. On October 22, 1913, William Amos filed a motion in the proceeding asking to be made a party defendant, which motion was on October 24, 1913, granted and allowed; and on November 1, 1913, William Amos filed an answer and cross-petition alleging that theretofore he had obtained a judgment against the decedent, upon which execution had issued and levy was made, during the lifetime of the decedent, on the real estate described in the petition, which judgment was the first and best lien against the decedent's real estate. No notice of appeal was given, or appeal taken, or error proceeding instituted from the order allowing Amos to become a party defendant in the case within the time prescribed by law. The practical effect of granting the motion of William Amos to become a party defendant was to suspend further proceedings by the administrator and to modify the decree of July 28, 1913, so far as liens and priorities of liens were concerned, and the cause was set for hearing *de novo* upon that question. The original decree was entered during the May term of the probate court.

These questions arise: Could this decree be modified during the September term immediately following the May term? Was the decree of July 28th vacated? Has the probate court regular terms? The subsequent decree entered by the court on the 29th day of December, 1913, seems to indicate that the whole cause was heard *de novo* on that day, evidently *sua sponte*.

On December 5, 1913, the cause came on for further hearing upon the petition of the administrator and the answers and cross-petitions of the Coles and William Amos, and was reserved for decision.

On December 29, 1913, the court rendered its decision, from which it clearly appears that the court considered that the whole cause was then before it *de novo*.

The law is well settled that, as a general rule, courts of general jurisdiction possess the inherent power of controlling their own orders and decrees, and during the term may correct, modify, vacate or set aside such judgments, orders or decrees.

In *Kinsella v. DeCamp*, 15 O. C. C., 494, it was held or announced, that where a judgment has been correctly entered upon the journal of the court, and no motion for a new trial has been interposed, as provided by law, and the court, being convinced on subsequent reflection that the decision so rendered was wrong, may, at the same term of the court in which such judgment was entered, vacate the same, is a proposition that is seriously questioned; that is, the doctrine of this case seems to be, that where a judgment has been regularly and correctly entered upon the journal of the court, the court may not *sua sponte* vacate or modify the same, even during the term at which it was rendered and journalized; and the court is emphatic in saying that if a court could do this, it applied to courts of general jurisdiction and which have regular terms only.

There can be no doubt but that the probate court, if a court of general jurisdiction, having regular terms, upon motion filed to correct, modify or vacate its judgment, could do so during the same term. The probate court, however, is a court of limited jurisdiction, and it has been held that the provision of the statutes providing for the granting of new trials on applications made during the term at which the judgment was rendered, are not applicable to the probate court; and further, that the power of such court to vacate and modify its judgments or orders is governed by 5334-5363, Revised Statutes (now 11631-11643, General Code), and is limited to applications made after the term, and under said sections the probate courts are considered as holding three terms of four months each in a year. In *re Application of Blake*, 14 O. D. (N.P.), 89, however, it has been held that all courts have control over their journals and dockets, so that they may at all times see that they speak the truth as to what the court has done; but when a matter has been controverted, and the court has decided the question, and the judgment of the court has been correctly placed on the journal, it is final as to the power of the court to change, except as pointed out by the statute, and as to this the statute has made ample provision.

Section 5305, Revised Statutes (now 11576, General Code) has provided for what causes a decision may be vacated and a new

1914.]

Mansfield v. Cole.

trial granted during term; but 5307, Revised Statutes (now 11578, General Code) provides when application must be made, and 5354, Revised Statutes (now 11631, General Code) *et seq.*, provide when and how courts may vacate and modify their judgments after term. All these provisions are held applicable to the probate court in *Exposition Building & Loan Co. v. Spiegel*, 12 O. C. C., 761. But query.

Section 11212, General Code, provides that the provisions of law governing civil proceedings in a court of common pleas, so far as applicable, shall govern like proceedings in the probate court when there is no provision on this subject in this title. But this section has no application to the mode in which appeals may be taken. *Keck v. Douglass*, 6 O. C. C., 649. It is limited to "like proceedings." See 9 O. L. R., 105.

It is quite evident that the action of the probate court in practically vacating the entry of July 28, 1913, by its decision of December 29, 1913, was erroneous; that is, we believe the court had no power, if the statutes were strictly followed, to *sua sponte* or otherwise make the entry or render the judgment and decree of December 29, 1913; but the court rendered this opinion and entered this judgment and decree, that is, of December 29, 1913.

The question arises, was the action of the court void, or merely voidable?

The court, of course, had jurisdiction of the subject-matter, and therefore it must be held that the decree of December 29, 1913, was not void, but merely voidable; that is, an appeal would lie from such decision or judgment to the court of common pleas, where the same might have been reversed.

In *Swasey & Company v. Antram & Company*, 24 O. S., 87, it appears that one of the defendants, in an action on a joint contract, died before judgment, and a judgment was taken against all the defendants without any suggestion of the death of the defendant who died or making his representatives parties; and it was held that such judgment was not void, but merely voidable. And on page 96 of the opinion the court says, that until the judgment is voided by proceedings in error by the representatives of the deceased defendant, it is final both as to him and as to the other defendants. It is not even voidable

by the other defendants, because, although erroneous, it is not erroneous to their prejudice.

In *Buchanan v. Roy's Lessee*, 6 O. S., 252, it was said that want of jurisdiction of the cause, equally as much as want of jurisdiction of a person, may render a judgment or decree void.

The doctrine seems to be, that while the court of common pleas, as a general rule, may vacate or modify judgments, decrees, or orders during the term in which they were made, yet its power to do so *sua sponte* is doubted by very respectable authorities; that is, where the court, on hearing had in a matter before it, renders its judgment, which is duly entered upon the journals of the court, its power upon its own motion to change, modify, or vacate such judgment, because it thereafter, upon further reflection, comes to a different conclusion, is doubted; and we think the power should be denied, as its exercise is fraught with danger and may lead to abuse. The common pleas court is one of general jurisdiction having regular terms. The probate court is a court of limited jurisdiction, having only such powers as the statutes confer upon it. The probate court is open for business at all times. It has no regular terms—its terms, such as it has, being for special purposes only. Its jurisdiction, being limited by statute, is specific and not general. Even its incidental and auxiliary powers are limited to such as are necessary to enable it to carry into effect the powers expressly granted by statute (*Davis v. Davis*, 11 O. S., 386). Therefore it is extremely doubtful whether the doctrine—that the court of common pleas, being a court of general jurisdiction, has control over its docket and judgments during the term—applies to the probate court, which has no regular term, being open at all times for the transaction of business.

It was held in *Exposition Building & Loan Co. v. Spiegel et al*, 2 C. C., 761, *supra*, that the probate court has three terms each year by virtue of Section 5365, Revised Statutes (11643, General Code), and that the statutes relating to a new trial in the court of common pleas during the term apply to the probate court. We think it more than doubtful if this doctrine can be sustained; indeed we believe that it is not the law. A careful reading of Section 11643 seems inevitably to lead to a different conclusion. This section reads as follows:

“The provisions of this chapter shall apply to the Supreme Court and probate court, so far as they may be applicable to their judgments or final orders. In estimating time, the probate court, *for this purpose*, will be considered as holding in each year three terms of four months each, the first commencing on the first day of January of each year.”

For what purpose, now, may the probate court be considered as holding in each year three terms of four months each? Surely for the purpose of making the provisions of chapter 6, title 4, division 4, applicable to the probate court. The language seems to us to be clear. It says, “in estimating time, the probate court, *for this purpose*,” that is, for the purpose of estimating time under this chapter, “will be considered as holding in each year three terms of four months each.” The word “considered,” meaning regarded in a certain or particular aspect, is significant of the legislative intent of limitation.

We are sustained in this view by the well-considered opinion of Judge Bigger in *In re Application of Jane Blake*, 14 O. D., 89. Reference to this case will be made hereafter. The question may be one of such doubt, however, that the authoritative and controlling decision of our court of appeals may be necessary; and if our court of appeals should sustain the view here taken, a contrary view being taken by the Hamilton county circuit court, the matter might then be taken to the Supreme Court and the law on the question finally determined.

It is difficult to understand how Sections 11576 *et seq.*, relating to motions for new trials in the court of common pleas, can apply to the probate court, as it is provided in these statutes that the application must be made or the motion filed at the term the verdict, report, or decision is rendered, and within three days thereafter, except for the cause of newly discovered evidence. And it is also difficult to understand how Section 11643, giving the court of common pleas or the court of appeals power to vacate or modify its own judgments after the term at which the same were made, empowers the probate court to hear and grant motions for new trials filed during term, for the reason that this section makes the provisions of the chapter only applicable to new trials after term. The section itself, by its very

language, limits this right to the purpose of filing motions or petitions after term, and for the purpose of doing so giving to the probate court authority to hold three terms of four months each in each year.

Again, by statute it is provided that for criminal purposes the probate court shall have monthly terms, and except for that purpose, that is, filing motions or petitions for new trials, after term; and in criminal matters the probate court, as such, has no terms; and being a court of limited jurisdiction, having no terms except for special purposes provided by statute, we hold it has no power to change, modify or vacate its judgments legally rendered and entered upon its journals, except such power is expressly conferred by statute. See *Kinsella v. De Camp, supra*; also *In re Application of Jane Blake, supra*. In both these cases the probate court sought to modify or change a judgment previously regularly entered. The only question upon which the court has any possible doubt is, whether the judgment or decree of the probate court of December 29, 1913, modifying and in effect vacating its entry of July 28, 1913, is void, or voidable merely.

If the probate court has no power or authority except as expressly granted by statute, and it has no power or authority to vacate or modify its judgments or decrees duly and regularly rendered and entered upon its journals, may not the entry of December 29, 1913, be a nullity, that is, absolutely void and of no effect, even though it had jurisdiction of the subject-matter?

In *Swasey & Co. v. Antram & Co.*, 24 O. S., 87, *supra*, a judgment rendered against a dead man was held voidable merely, for the reason, no doubt, that the court had obtained jurisdiction, as service was had upon him during his lifetime. In the case at bar Andrew J. Cole waived service of summons and entered his appearance. The court not only had jurisdiction of the subject-matter, but Cole was also regularly before it and had voluntarily submitted to its jurisdiction. Having failed to avail himself of the rights the statutes gave him as to appeal, can he now complain? The question is not without difficulty and is not wholly free from doubt; and it might therefore be well, as has been just remarked, to have the matter passed upon

1914.]

Mansfield v. Cole.

by the court of appeals, and thus obtain a more authoritative and controlling decision upon this and other phases of the case. In any event, it is not too late for the parties to avail themselves of the provisions of Chapter 6, Title 4, Division 4 of the General Code, relating to vacating judgments and orders after term, if they can bring themselves within the provisions of that chapter.

No appeal or notice of appeal having been given from the action of the court in practically vacating its order of July 28, 1913, by its decree and judgment of December 29, 1913, the defendants, or either of them, can not now be heard to complain.

The finding of the court on December 29, 1913, was:

(a) That William Amos had the first and best lien against the real estate of the decedent in the sum of \$767.76.

(b) That Andrew J. Cole is not entitled to any lien upon the property of the decedent, and his cross-petition was dismissed.

(c) The administrator, or the plaintiff in this action, was ordered to sell the real estate at public sale.

(d) That out of the proceeds he pay, first, the costs of the proceeding; second, the taxes due on the property; third, pay William Amos the amount found due him; fourth, that the administrator make due return of the sale, and wait the further order of the court.

Manifestly, if this judgment, order or decree is valid, and we hold that it is, nothing further remained to be done in the premises by the administrator or the court, except such acts of detail as were necessary to effectually and legally carry into effect the decree or judgment of the court. So far as Andrew Cole and William Amos were concerned, there was nothing further to be done if the administrator thereafter proceeded regularly and according to law. The court had fully determined and adjudged the controversy submitted to it, and had determined the rights of the parties and the relief to be awarded as between them. The court had pronounced the sentence of the law, rendered its judgment and made its final order in the matter; and all that remained to be done related merely to the necessary details to carry this order into effect, in doing which situations might have arisen in which the court would be called upon to

make what may be termed final orders, but only such orders as might be ancillary to the judgment itself and to its enforcement.

The court found, in this decree or judgment of December 29, 1913, that Andrew J. Cole had no lien on the real estate in question, and was not entitled to the relief prayed for in his cross-petition. If he believed he was aggrieved or injured by this holding or finding of the court, he could appeal to this court; but the statute, Sections 11207 and 11209, General Code, provides he should give notice of his intention to so appeal and file bond within twenty days of the rendition of the judgment or decree of which he complains. The purpose of the statute in limiting the time within which an appeal may be perfected and the proceedings incident thereto, is obvious; it is to prevent unnecessary and unreasonable delays in the final determination of legal controversies, and this is especially true of controverted issues in the probate court. That the estates of deceased persons, where the rights of children, creditors and legatees are involved, should be settled as speedily as possible consistent with the due administration of estates, will be admitted by everybody.

Andrew J. Cole did not give notice of his intention to appeal within twenty days after the rendition of the judgment of which he now complains; nor did the administrator, the plaintiff in this action; nor did Andrew J. Cole perfect an appeal as provided by law; and the plaintiff and the said Cole having failed to do this, the orders of the court subsequent to December 29, 1913, ancillary to the sale, advertising the property, confirming the sale and ordering a deed, were of no concern to Andrew J. Cole. The court having found Andrew J. Cole had no lien upon the property, and having denied him the relief he claims in his cross-petition, and he having failed to take the necessary steps to perfect an appeal from such finding, has he not lost the right to complain of the distribution of the proceeds? The decree or judgment of December 29, 1913, contains an order of distribution which, so far as Cole is concerned, can in no way affect him, as the court found he had no lien upon the property, except that he might have appealed from this judgment or decision. If in fact and of right he has no lien upon the land in question, and is not entitled to any relief in the premises, how can the question of distribution affect him?

1914.]

Manafield v. Cole.

Attention is called to these matters for the reason that it is quite evident that the real issue here involved is a controversy between the cross-petitioners Cole and Amos.

Before proceeding to examine the question immediately before the court, it may be well to call attention to the fact that much contention and controversy has arisen among lawyers and courts as to the meaning of the terms *final* and *interlocutory*, as these terms are sometimes applied to judgments as well as to the distinction between a judgment, decree and order. These disputes are often more fanciful than real, and generally arise upon the construction of language or wording of statutes or rules of court, often having reference to the proper time or modes of appeal or of execution. We all understand that a judgment is the final determination or adjudication of the rights of parties to an action. See Section 11582, General Code. In the Roman or civil law, a decree was the decision of the Emperor as the supreme judicial officer deciding a case referred or submitted to him. In English law a decree was more particularly the judgment of a court of equity, such in the United States as a decree of foreclosure or divorce; but in England since the adjudicature acts the term judgment is used in reference to the decisions of all the divisions of the supreme court. In the United States a decree generally means any decision made of record in a cause; and an order is a judicial direction of a court made to be entered of record in a cause, and not included in the final judgment (see Section 11582, General Code), such as sustaining a demurrer to a petition, or if it affects a substantial right which in effect determines the action, or if it affects a substantial right made in a special proceeding or upon a summary application in an action after judgment (see Section 12258, General Code). A decree is final which disposes of the whole merits of the cause, and leaves nothing for the further consideration of the court (*Kelley v. Standberry*, 13 O., 408); that is, it disposes finally of a case previously pending. An interlocutory decree or order is a decree or order with reference or regard to a special matter in a pending cause, but which does not decide the whole case. In general, it may be said that a judgment is a final decision obtained in an action, and every other decision is an order.

If these definitions are correct, and we believe they are, it must be conceded that the finding of the probate court of December 29, 1913, was a final decree and judgment, so far as deciding and adjudicating the rights of the parties before the court. So far as Andrew J. Cole was concerned, there was absolutely nothing left for the further consideration of the court. If the court refused, on motion filed within the legally prescribed time, to vacate this judgment or decree, or grant a new trial, and if Cole failed to give notice and perfect an appeal within the time limited by law, he is irrevocably and forever concluded by that judgment or decree.

On February 16, 1914, a motion to confirm sale, marshal liens and for an order of distribution was filed. Inasmuch as the liens had been marshaled and priority thereof determined and distribution ordered on the judgment and decree of December 29, 1913, this motion, except so far as it related to the confirmation of sale, was properly overruled and denied on the 21st day of February, 1914. To this ruling of the court the plaintiff and defendants excepted, and their exceptions were noted and appear of record.

On February 25, 1914, the administrator, as plaintiff, filed his written notice of his intention to appeal to the court of common pleas, but from what? The journal of the probate court says he gave such notice of his intention to appeal from the judgment and order of the court theretofore made on the application for a marshaling of liens and for an order of distribution. This is practically the very language of the motion itself. There was then no order but this from which he could appeal. An appeal does not lie, and may not be had from this order, unless it can be said that the motion to marshal liens and for distribution is a special proceeding or a summary application in an action after judgment. In an action at law or in equity, any act done by authority or direction of the court, and all the various steps taken in a cause by either party, is a proceeding; but what is a special proceeding? Proceedings had under Sections 11631 to 11643, General Code, are special proceedings. Others may suggest themselves to counsel. An order of distribution is a final order. See *Earnfit v. Winans*, 3 O., 135. The difficulty, how-

1914.]

Mansfield v. Cole.

ever, is, that an order of distribution was inserted and made a part of the judgment and decree December 29, 1913; and at the time the motion was filed, February 6, 1914, to marshal liens and for an order of distribution, this judgment and decree of the probate court was in full force and effect. The time to appeal therefrom or to vacate the same had expired. The court itself had lost control over the matter, as the judgment or decree was entered in the September term, 1913; providing it can be said, as a matter of law, that the probate court may in any event modify, change or vacate an order once regularly made and entered upon its journals, except as provided by Section 11631 *et seq.* Setting aside a judgment or decree regularly entered, or vacating a default, would be a summary proceeding in a proceeding after judgment; but such action must be taken during the term at or in which the judgment or decree was entered or the default taken, unless it be done by special proceedings provided by statute for granting a new trial or vacating judgment after term. The court could not legally or consistently grant the motion, as in effect it would, of necessity, if a different order was made, vacate the judgment or decree of December 29, 1913. This could not be done at this term or in this way, if it could be done at all.

Counsel for plaintiff contend that, having appealed from the order of the court overruling the motion to marshal liens, and from an order of distribution, the whole case and every act taken, done and performed in relation thereto by the probate court, from the day the petition was filed until the appeal was perfected, is now before this court.

A moment's reflection will demonstrate the fallacy of this proposition. An order confirming a sale is a final order. *Teaff v. Hewitt*, 1 O. S., 511. Suppose on a foreclosure proceeding in the common pleas court, on hearing had, a decree or judgment of foreclosure is entered, in which liens are marshaled, distribution and sale ordered, and the property is advertised and sold, and a motion is subsequently made to confirm the sale, and this motion is opposed for the reason of irregularity and fraud in the appraisal and bidding; and if, upon hearing had, the court confirms the sale or grants the motion, would an appeal or writ of error to the court of appeals operate to vacate the decree and

bring the whole cause and every act had in relation thereto in the common pleas court before the appellate court, to be there litigated and determined *de novo*, or would the appeal or writ of error bring before the appellate court only the act of the common pleas court in confirming the sale? The answer to this question answers the contention of counsel. If the contention of counsel be true, in the nature of things there never would be an end to litigation.

The only possible question before this court is the order of the probate court overruling plaintiff's motion to marshal liens and for an order of distribution. As this motion asks the court to do that which it had already theretofore done at a former term, if as a matter of fact the probate court has regular terms, it might have been properly stricken from the files.

Rockel, in his admirable work on probate practice, Vol. 1, page 906, says, that while in some states an appeal in a proceeding of this kind is regarded as an entirety and bringing all orders made before confirmation before the appellate court as interlocutory ones; but that in our state it would seem that the order made upon the petition, finding it necessary to sell real estate, would be a final order as to the questions passed upon in such order (citing *Potter v. Jennman*, 4 N. P., 78; 4 Dec., 444); and further, that the finding made on confirmation of appraisement, and confirmation of sale, would also be a final order (citing *Evans v. Dunn*, 26 O. S., 439, and *Kelley v. Standberry*, 13 O., 442). Therefore Mr. Rockel says: "If appeal is to be taken from any one of these orders, it must be taken within the time limited from the date of each order; and the same rule would be applied in proceedings in error. It has been questioned whether the right of appeal exists as to the order confirming the sale" (citing *Norwood v. Park Co.*, 4 N. P., 240, 6 Dec., 341).

Attention is called to the case of *Potter, Teare & Co. v. Jennman*, 4 O. D., 444.

On February 25, 1914, the probate court, in an order, found that the administrator was appealing in the interest of his trust, and that no bond was required of him.

On April 2, 1914, this order was vacated by the court on motion duly filed by William Amos, one of the defendants herein.

1914.]

Renz v. Schmid.

the court in this latter order finding that the administrator was not appealing in the interest of his trust, and bond was required.

Counsel for plaintiff claims that the court erred in so finding.

We have carefully examined the record, and are firmly of the opinion that the court properly granted this motion, and properly found that the administrator was not appealing in the interest of his trust. This was not a final order, as it in no way affected any substantial right of the decedent's estate. It can not be said the proceeding was adversary or a proceeding *inter partes*. See *Johnson v. Johnson*, 26 O. S., 357. The administrator has no interest in the estate except that growing out of his trust relation to it, and the order did not in any way affect him in that relation.

For the reasons indicated herein, the appeal will be dismissed, and the same course will be taken with reference to the petition in error.

FAILURE TO ENDORSE AMOUNT SUED FOR ON SUMMONS.

Superior Court of Cincinnati.

ELSIE RENZ v. JESSIE H. SCHMID ET AL.

Decided, January 2, 1914.

Summons—Not Legal Unless Properly Endorsed—Subsequent Issue of a Proper Writ—Treated as the Original Writ.

A summons in an action for the recovery of money only upon which there is no endorsement of the amount sought to be recovered, is ineffective to bring the defendant into court, and the plaintiff, on discovery of the mistake, may thereafter have a properly endorsed summons issued.

Chas. L. Hopping, for plaintiff.

Powell & Smiley, contra.

PUGH, J.

The petition in this case was filed August 2d, 1913, and summons issued thereon to the defendants, Jessie H. Schmid and Albert P. Schmid, and returned as served the latter personally and the former at her usual place of residence. Not having answered, a default judgment was entered up against both de-

defendants, and the jury assessed the damages at twenty-five thousand (\$25,000) dollars.

It then appeared that the amount of money sought to be recovered had not been endorsed on the summons as required by General Code, Section 11281, in actions for the "recovery of money only," and, at the instance of the plaintiff herself, the verdict was set aside and the judgment vacated and an alias summons was issued, properly endorsed, and the defendants served at their usual place of residence.

The case now comes before the court on the defendants' motion to quash the summons for the alleged reason "that there was no authority for the issuing of said alias summons and the same was issued contrary to law." The argument in support of this motion amounts to this: the first summons (which was not properly endorsed) was a valid writ and the alias summons is therefore unnecessary and unauthorized under General Code, Section 11284.

It is not necessary to determine whether the judgment by default was properly vacated for the reason assigned, nor whether the failure to properly endorse the summons could be cured by amendment. The question now before the court is simply whether there was authority of law for the issuance of the so-called "alias" summons.

General Code, Section 11281, requires that, in "actions for the recovery of money only," the amount sought to be recovered shall be endorsed upon the writ and provides that no greater sum than the amount thus endorsed shall be recovered. A summons in an action for money only, which is not endorsed in any amount is not a legal summons and does not bring the defendant into the court for any purpose. There can be no legal objection, in such case, to the subsequent issuance of a properly endorsed writ, and the summons then issued is not an "alias" summons but is the original writ itself. General Code, Section 11284, relating to alias summons has no application in such instance.

The motion of the defendants will therefore be overruled, and if desired they may file their answers, providing application for leave to file the same is made promptly.

1914.]

Monfort v. Ellis.

**LIMITATIONS AS TO TIME WITHIN WHICH SUIT MAY
BE BROUGHT.**

Common Pleas Court of Hamilton County.

ELIAS R. MONFORT ET AL V. LILLIE I. ELLIS ET AL.

Decided, December, 1913.

Sureties—Action on Bond of a Defaulting Contractor—Party Undertaking to Complete the Work Not an Agent of the Surety—Limitation as to Time for Bringing Suit on Bond—Judgment Non Obstante Veredicto—Ruling on Interlocutory Order Not Binding at Hearing on the Merits.

1. The limitation of time within which suit may be brought on the bond of a defaulting contractor is waived by the surety when it consents that another may step into the place of the contractor and complete the work.
2. Where a second default occurs as to which there was no waiver, and suit is not brought on the bond within the time stipulated therein, the limitation becomes effective and an action begun thereafter can not be maintained.
3. Where a court becomes satisfied on motion for a new trial that error was committed in not arresting the case from the jury at the close of the plaintiff's testimony and giving judgment for the defendant, the verdict may be set aside and judgment entered by the court *sua sponte* for the defendant.
4. A judge hearing a case on its merits is not bound by a previous ruling in an interlocutory order in the same case, where to follow such ruling would perpetuate error and work an injustice.

Thomas L. Pogue and John V. Campbell, Prosecuting Attorneys, and William R. Collins, for plaintiffs.

Gordon, Morrill & Ginter and Dolle, Taylor & O'Donnell, contra.

GORMAN, J.

This action was commenced on March 21, 1908, by the trustees of the memorial association of Hamilton county and the county commissioners of Hamilton county. to recover a judgment for \$33,452.30 against Lillie I. Ellis. William H. Ellis & Com-

pany, the Bankers Surety Company, a corporation under the laws of Ohio, and James M. Sprague, receiver for W. H. Ellis & Company. Since the commencement of the action Lillie I. Ellis has been dismissed as a party defendant upon the application of plaintiffs, and plaintiffs, during the trial of the case, disclaimed any purpose to recover a verdict or judgment against James M. Sprague, receiver for W. H. Ellis & Company.

There have been in this case a petition, an amended petition, an amendment to the amended petition, and a second amended petition. There were also several answers and amended answers filed by the parties to the suit.

The case was heard and determined by the court and a jury upon the second amended petition filed herein February 12, 1913, the answer thereto of the Bankers Surety Company filed July 17, 1913, and the reply of the plaintiff to said answer filed October 2, 1913.

Previous to the trial before the court and jury, there were several interlocutory motions and demurrers disposed of, one of which, a demurrer to the second and third defenses of the answer and amended answer of the Bankers Surety Company, decided July 3, 1911, by Honorable Wade Cushing, one of the judges of this court, will be noted later in this opinion.

This case came on to be tried before this individual member of the court on October 15, 1913, upon the pleadings above referred to.

The second amended petition counts upon a recovery of damages upon a bond against the defendants, William H. Ellis & Company and the Bankers Surety Company, for the breach of a contract entered into by W. H. Ellis & Company with the trustees of the memorial association of Hamilton county, Ohio, for the erection of a memorial building at the northwest corner of Elm and Grant streets, in the city of Cincinnati.

From the pleadings, the evidence and the admitted facts in the case, it appears that on the 4th day of March, 1905, W. H. Ellis & Company entered into a contract in writing with the said association, which was organized under the laws of the state of Ohio, to build the memorial building aforesaid,

1914.]

Monfort v. Ellis.

for \$144,561. For the faithful performance of the contract W. H. Ellis & Company gave an undertaking with the Bankers Surety Company as surety, conditioned for the faithful performance of said contract, in the sum of \$73,000, which contract was referred to and made a part of said bond. On the 13th of May, 1905, the firm of W. H. Ellis & Company the partnership which entered into said contract, went into the hands of a receiver, duly appointed by the Court of Common Pleas of Hamilton County, and thereupon the said W. H. Ellis & Company defaulted, failed and neglected to prosecute the work or complete the contract of erecting said building. Between the 13th of May, 1905, and the 18th of July, 1905, various negotiations were had between the plaintiff association, W. H. Ellis & Company, Lillie I. Ellis, the wife of W. H. Ellis; and the Bankers Surety Company. The contract provided, among other things, Article V, that should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any agreement therein contained, such refusal, neglect or failure being certified by the architects, Hannaford & Sons, the owners shall be at liberty after five days written notice to the contractors, to provide any such labor or materials and to deduct the cost thereof from any money then due or thereafter to become due to the contractors under the contract; and further, if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owners shall be at liberty to terminate the employment of the contractors for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under the contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work and to provide the materials therefor, and to charge the cost of completing the work to the contractors. It was further provided in the contract that estimates of the work should be made from time to time by the architects and payments made upon the certificate of the archi-

fects. The bond of the Bankers Surety Company, among other things, provided that if the principal shall fail to comply with the conditions of said contract to such an extent that the same shall be forfeited, then said surety shall have the right and privilege to assume said contract and to sublet or complete the same, whichever said surety may elect to do, provided it is done in accordance with said contract, and further said bond provided that any suits at law or proceedings in equity, brought against this bond, to recover any claim thereunder, must be instituted within six months after the first breach of said contract, and that the said surety shall not be liable for a greater sum than the penalty thereof, that is, \$73,000. These are the material parts of the contract and bond which are necessary to refer to and keep in mind for the determination of this motion.

The record further discloses that as soon as W. H. Ellis & Company passed into the hands of a receiver, to-wit, on or about the 13th of May, 1905, the plaintiff association notified the Bankers Surety Company in writing that the firm of W. H. Ellis & Company had been placed in the hands of a receiver and that the board of trustees would hold the Bankers Surety Company responsible for the failure of W. H. Ellis & Company to complete the work in accordance with the terms of the contract. This notice was duly received by the Bankers Surety Company. On June 15, 1905, as appears from the minutes of the plaintiff association, James M. Sprague, the representative of the Bankers Surety Company and also receiver for Ellis & Company, appeared before the trustees of the memorial association, upon their request, and stated that the bonding company which he represented were not contractors and declined to assume the completion of the contract, but desired that the board should assume the contract under the direction of Mr. Kennedy, who was a partner of W. H. Ellis. This was a month after W. H. Ellis & Company had defaulted on the contract. There was also present Mr. Louis Dolle, as attorney for W. H. Ellis & Company, who made a statement on behalf of that company. No action was taken at this meeting by the

1914.]

Monfort v. Ellis.

memorial association. On June 20, 1905, the association held another meeting at which Mr. Dolle presented a proposition on behalf of W. H. Ellis & Company, through W. H. Ellis, in substance offering to do the work through Harry E. Kennedy, who should be in active charge of the work and complete the building. It is unnecessary to set out at length the details of this proposal. On the 24th of June, 1905, the trustees met and rejected the proposition made by W. H. Ellis. Matters remained in this condition until about the 15th of July, 1905, when there was presented to the association at a session held by it the following letter from Lillie I. Ellis, dated July 11, 1905, and addressed to the memorial association:

"Having indemnified the Bankers Surety Company of Cleveland, Ohio, who is surety upon the bond of W. H. Ellis & Company, with whom you entered into a contract, under date of March 4th, for the construction of the memorial building at Grant and Elm streets, Cincinnati, Ohio, I respectfully request in view of the fact that the firm is unable to complete its contract by reason of the proceedings pending between the members for a dissolution of the co-partnership, and I being ultimately liable for damages which may be sustained by the failure of the firm to complete their said contract, that I be granted permission to complete such contract in accordance with the plans and specifications forming part of the agreement which you entered into with said firm, and herewith hand the consent of the Bankers Surety Company to my undertaking such work.

"Yours very respectfully,

"LILLIE I. ELLIS."

At the same meeting there was also presented to the plaintiff association a letter from the Bankers Surety Company, in connection with the above letter of Lillie I. Ellis, which letter is as follows:

"We have advised Mrs. Lillie I. Ellis of the demand made upon us as surety for the completion of the memorial building, which W. H. Ellis & Company agreed to construct under contract which you entered into with them.

"We agree to Mrs. Lillie I. Ellis completing the building in accordance with her request, and agree that all bills for ma-

terial and labor, approved by her or W. H. Ellis, or Harry E. Kennedy, or the architect, shall be evidence of the amounts expended for such purpose, and shall be included in the cost of completion of such structure and when so approved, shall be binding upon us as surety under such contract, it being distinctly understood that our liability as surety for such contract is not changed, but shall remain as originally fixed by bond given, on which we are surety, for the faithful performance of the contract of said W. H. Ellis & Co.

“Yours very respectfully,

“W. A. MACBETH,

“2nd Vice-President, the Bankers
Surety Company.”

On July 18, 1905, the association met and had these two letters, the one from Lillie I. Ellis and the other from the Bankers Surety Company, before them. Whereupon the association passed the following resolution:

“WHEREAS, on the 4th day of March, 1905, W. H. Ellis & Company entered into a contract with this board for the construction of the memorial building, in accordance with the plans and specifications thereto and a part thereof, at Grant and Elm streets, Cincinnati, Ohio, and gave the bond of the Bankers Surety Company of Cleveland, Ohio, as surety to this board for the performance thereof, subsequently an action was commenced in the Common Pleas Court of Hamilton County, Ohio, known as No. 131,469, against W. H. Ellis and others, wherein James M. Sprague was appointed receiver, etc., and said firm of W. H. Ellis & Co. now declare their inability to proceed with the erection of said structure, and the Bankers Surety Company decline to perform the said contract, and the said W. H. Ellis & Co. requesting that Lillie I. Ellis be permitted to finish said building, and this board being now advised that Lillie I. Ellis is willing to finish said building in performance of the contract, plans and specifications, and desires to subrogate herself to the rights of said W. H. Ellis & Co., in the completing of the memorial building, and the said Bankers Surety Company of Cleveland, Ohio, having filed with this board its written consent to Lillie I. Ellis completing the building in accordance with her request, Therefore,

“Resolved, That Lillie I. Ellis, be and hereby is granted permission to complete the said memorial building in accordance with the contract, plans and specifications as entered into by the

1914.]

Monfort v. Ellis.

said W. H. Ellis & Co., and that she is permitted to proceed, perform and fulfill the said contract, plans and specifications in as complete manner as the same were to be performed by the said W. H. Ellis & Co.

“Resolved, That all material, equipment, etc., belonging to the said W. H. Ellis & Co., now on the ground, may be taken possession of, without liability on the part of this board, by the said Lillie I. Ellis and her agents in furtherance of the performance of the said contract.”

The resolution was unanimously adopted. Thereupon the work of completing the building proceeded and the moneys in the county treasury available for the erection of the building were paid out to Lillie I. Ellis upon the certificate of the architects, Hannaford & Sons, and upon the approval of the association. No moneys thereafter were paid either to W. H. Ellis & Company or the Bankers Surety Company, nor were any vouchers or warrants drawn in favor of either of said parties. The vouchers, under a rule adopted by the association, were required to be endorsed by the architect and by W. H. Ellis and probably Lillie I. Ellis. W. H. Ellis, the husband of Lillie I. Ellis, superintended the work after July 18, 1905. The work of completing the building progressed from the above date until about the 10th day of April, 1907, at which time there was a cessation of work upon the building, and Lillie I. Ellis defaulted in the performance of the contract. The minutes of the plaintiff association show that on that date, April 10, 1907, the architect reported that the contractor was absent from the city and that no effort was being made to continue the work; that he learned that the men on the work had not been paid, and that they were about to quit work on the building. The association, upon receiving this word, directed the architects to take charge of the building upon the workmen of the contractor retiring, and to place watchmen in the same to protect the premises from injury. On April 17, 1907, the trustees of the association received the following communication from Hannaford & Sons, the architects:

“Gentlemen: Whereas, Wm. H. Ellis & Co., and Lillie I. Ellis, or either of them, have refused and neglected to supply a

sufficiency of proper and skilled workmen and of materials of the proper quality, and have failed to prosecute the work with promptness and diligence, we hereby certify that such refusal, neglect and failure is sufficient ground for the termination of the employment of said Wm. H. Ellis & Co. and Lillie I. Ellis or either of them as contractors for the work of the Hamilton county memorial building.

“Respectfully,

“SAMUEL HANNAFORD & SONS.”

This certificate or communication was received and filed and the following resolution was presented and adopted by the unanimous vote of all the trustees present:

“WHEREAS, On the 6th day of April, 1907, the architect employed by this board, certified that the contractors have refused and neglected to supply a sufficiency of properly skilled workmen, and of materials of the proper quality and have failed to prosecute the work with promptness and diligence, and have failed in performing the contract, and

“WHEREAS, This board by resolution directed that five days written notice be given the contractor to advise this board whether or not he proposed to complete said contract, and said board holding that his failure to proceed with due diligence shall be deemed satisfactory ground to terminate the contract and to enter upon and take possession of the premises for the purpose of completing the work included in said contract, and

“WHEREAS, The secretary of this board has given five days written notice to the contractor as provided in said resolution, to advise this board of his intention and ability to complete said contract according to its terms, and the architects employed by this board, now certify that Wm. H. Ellis & Co. and Lillie I. Ellis have refused and neglected to supply a sufficiency of properly skilled workmen and materials of the proper quality, and have failed to prosecute the work with promptness and diligence, and certifies that such refusal, neglect and failure is sufficient ground for the termination of the employment of Wm. H. Ellis & Co. and Lillie I. Ellis as contractors for the work of erecting memorial building; therefore be it

“Resolved, That the failure of the contractor to advise this board whether or not he proposes to complete said contract, and his failure to proceed with due diligence, and his refusal and neglect to supply a sufficiency of properly skilled workmen and of materials of the proper quality, and his failure to prosecute

1914.]

Monfort v. Ellis.

the work with promptness and diligence is by this board deemed to be sufficient reason for their termination of the contract and the discharge of the contractor; and be it further

“Resolved, That the employment of the contractors of said contract, be and is now terminated and that this board enter upon the premises and take possession, and the architects are directed to prepare plans and specifications of the unfinished portion or portions of said work, and the same to be awarded after advertisement in the manner provided by law.”

There was also the following resolution adopted at said meeting:

“WHEREAS, This board having terminated the contract with the contractors, heretofore employed by this board, and have instructed the architects employed by this board to prepare plans and specifications for the unfinished portion or portions of the contract for the erection of the Hamilton county memorial building, therefore, be it

“Resolved, That the clerk of this board be and is hereby directed to advertise for bids for the completion of said Hamilton county memorial building, in conformity with the statute in such cases made and provided.”

Thereupon the trustees of the association had new plans and specifications prepared for the incompleted work of the building through the architects, Hannaford & Sons, advertised for bids for the work and proceeded to do the work of completing the building. The final cost of completing the building, including the sums paid out to W. H. Ellis & Company, Lillie I. Ellis, and the contractors employed by the association after the default of Lillie I. Ellis on April 10, 1907, amounted to \$30,854.56 over and above the contract price. There was also incurred an additional expense for the architects in preparing new plans and specifications, advertising and other sums, bringing the total cost to the memorial association of the completion of the building, over and above the contract price, to \$32,992.54. There was also paid out upon the orders of the memorial association \$347.55 on account of claims for labor and materials. But the court was of the opinion that inasmuch as no liens had ever been perfected for these claims the memorial association

was not legally justified in paying out the same and therefore disallowed this sum as an item of damage against the defendants.

Upon the completion of the building it was found that the contract price had been exhausted and in addition thereto the amount above stated had been expended in the completion of the work.

This action is to recover the amount which the county of Hamilton and the memorial association trustees were required to expend over and above the contract price in the completion of this building.

At the close of plaintiffs' testimony upon the trial of the case, the Bankers Surety Company moved the court to instruct the jury to return a verdict in its favor, which motion the court overruled, to all of which counsel for the Bankers Surety Company duly excepted.

Neither the defendant, W. H. Ellis & Company, nor the Bankers Surety Company offered any evidence to meet the evidence offered by the plaintiffs, and the case having rested upon the testimony of the plaintiffs, the court instructed the jury to return a verdict in favor of the plaintiffs for the amount shown by the evidence to have been expended over and above the contract price, with interest thereon from the date claimed in the second amended petition, to-wit, November 1, 1907, which appears to have been the date of the completion of the building, up to the 6th day of October, 1913, the first day of the October term. Under these instructions of the court the jury retired and returned a verdict in favor of the plaintiffs and against the defendants, William H. Ellis and H. E. Kennedy, doing business as W. H. Ellis & Company, and the Bankers Surety Company, in the sum of \$44,729.66, which is the correct amount the plaintiffs would be entitled to recover, including interest, if the defendants or either of them are liable upon the contract and the bond.

Within three days of the rendition of the verdict a motion for a new trial was interposed by the Bankers Surety Company, setting out various grounds, and also an amended motion by the same company that the court vacate and set aside the ver-

1914.]

Monfort v. Ellis.

dict and enter a final judgment in its favor, or grant a new trial, as the court may determine, for the various reasons set out in the motion.

As to W. H. Ellis & Company the court is of the opinion that under the pleadings and the evidence the plaintiffs are entitled to recover the amount returned by the jury and there being no motion on behalf of that company for a new trial, the verdict will stand as to that company.

Now, as to the Bankers Surety Company, the question is, whether or not a verdict should have been rendered against it.

This company being surety for the faithful performance of the contract entered into by W. H. Ellis & Company would be liable to the plaintiffs for any damages that resulted from a default on the part of W. H. Ellis & Company, or a failure upon its part to perform its contract in accordance with the terms thereof and in accordance with the plans and specifications. W. H. Ellis & Company did default and failed to perform its contract on or about May 9, 1905, when a receiver was appointed for the firm. Upon this default the Bankers Surety Company had the right under the bond to step into the shoes of W. H. Ellis & Company and complete the erection of the building in accordance with the terms of the contract by virtue of that provision in the bond which provided that if the principal shall fail to comply with the conditions of said contract to such an extent that the same shall be forfeited, then said surety shall have the right and privilege to assume said contract and sublet or complete the same whichever said surety may elect to do, provided it is done in accordance with the said contract. The trustees of the memorial association evidently understood that the Bankers Surety Company had the right to do this under the terms of the bond, because they notified the Bankers Surety Company immediately on learning of the default of W. H. Ellis & Company, on May 16, 1905.

The Bankers Surety Company failed, neglected and refused to complete the contract or to sublet the same and so notified the trustees of the memorial association, as appears from their minutes. When Mr. Sprague, who was the manager and rep-

representative of the Bankers Surety Company, appeared before the memorial association in their session, on June 15, 1905, and stated that he was there representing the bonding company and also as receiver of Ellis & Company, and further stated that the bonding company were not contractors and declined to assume the completion of the contract but desired that the board should assume the contract under the direction of Mr. Kennedy, this, the court believes, was a distinct notice to the memorial association that the Bankers Surety Company would not complete the building under the terms of the bond. On July 18, 1905, a resolution was passed by the memorial association, and in this resolution the trustees set out, among other things, that

"The said firm of W. H. Ellis & Co. now declare their inability to proceed with the erection of said structure, and the Bankers Surety Company decline to perform the said contract, and the said W. H. Ellis & Co. requesting that Lillie I. Ellis be permitted to finish said building, and this board being now advised that Lillie I. Ellis is willing to finish said building in performance of the contract, plans and specifications, and desires to subrogate herself to the rights of said W. H. Ellis & Co., in the completing of the memorial building, and the said Bankers Surety Company of Cleveland, Ohio, having filed with this board its written consent to Lillie I. Ellis completing the building in accordance with her request, therefore

"*Resolved*, That Lillie I. Ellis be and hereby is granted permission to complete the said memorial building in accordance with the contract, plans and specifications as entered into by the said W. H. Ellis & Co., and that she is permitted to proceed, perform and fulfill the said contract, plans and specifications in as complete manner as the same were to be performed by the said W. H. Ellis & Company."

In the opinion of the court there is no conclusion which can be reached with reference to this matter other than that the memorial association agreed to a substitution of Lillie I. Ellis for W. H. Ellis & Company in the contract for the erection of this building, and to the extent of this substitution of Lillie I. Ellis for W. H. Ellis & Company there was a modification of this contract. All the terms and conditions of the contract were to remain in force and binding upon Lillie I. Ellis, and the Bankers

1914.]

Monfort v. Ellis.

Surety Company having consented in writing that Lillie I. Ellis should be substituted for W. H. Ellis & Company to complete the building and that its liability should continue the same for Lillie I. Ellis as for W. H. Ellis & Company, it became thereby bound for the faithful performance of this contract by Lillie I. Ellis to the same extent and in the same manner as it was bound for the performance thereof by W. H. Ellis & Company.

This conclusion of the court is supported by the conduct of the parties after Lillie I. Ellis began the work, July 18, 1905. The vouchers were all made out to Lillie I. Ellis and not to W. H. Ellis & Company, or to the Bankers Surety Company. The Bankers Surety Company retained no supervision over the work. The architects of the plaintiffs required the endorsement upon the vouchers, warrants and bills, of Lillie I. Ellis and W. H. Ellis, but not of the Bankers Surety Company. The architects in their report to the plaintiff association, recognize Lillie I. Ellis as the contractor and that W. H. Ellis was acting on her behalf. The minutes of the association and the reports of the architects will show this to have been done. Upon the default of Lillie I. Ellis, April, 1907, the Bankers Surety Company was notified and Mr. Thorndyke appeared on behalf of the company but the record fails to disclose that the Bankers Surety Company was asked to assume the completion of the work and fails to show any request on the part of the Bankers Surety Company to assume the completion of the work.

I can come to no other conclusion than that this work of completing this building was done by Lillie I. Ellis, either on her own behalf or on behalf of W. H. Ellis & Company, and not on behalf of the Bankers Surety Company. I have given the question as much thought and consideration as the limited time in which I should decide this motion will permit.

How then stands the case?

The default of W. H. Ellis & Company was waived by the Bankers Surety Company when it consented that Lillie I. Ellis should go forward and complete the work and that it would be bound for the faithful performance by her to the same extent and as fully as it was bound to W. H. Ellis & Company.

Therefore, the Bankers Surety Company can not avail itself of the default of W. H. Ellis & Company, nor can it claim that an action should have been brought within six months from the date of that default, but the second default, the default of Lillie I. Ellis, on or about April 10, 1907, is one for which the Bankers Surety Company, as surety, would be liable, and, unless the plaintiffs have been guilty of failure to prosecute this suit within the time specified in the bond, the Bankers Surety Company must respond in damages for the loss occasioned by the default of Lillie I. Ellis.

Now, the bond provides that suit must be brought within six months from the first default, but the first default having been waived, the court is of the opinion that the action need not have been brought until within six months from the date of the second default, on or about April 10, 1907. As a matter of fact, suit was brought on March 21, 1908, more than eleven months after the default of Lillie I. Ellis, and more than six months after the memorial trustees had taken possession of the building, prepared new plans and specifications for the completion thereof, advertised for bids and ordered the contract for the completion of the work.

The action, therefore, was not brought by the plaintiffs within the six months period of limitation provided in the bond.

Was there a waiver of this limitation by the defendant, the Bankers Surety Company?

No waiver is pleaded by the plaintiffs, nor is there any evidence tending to show that the Bankers Surety Company waived its rights under the bond to require the plaintiffs to bring their action within the six months period. The fact that the Bankers Surety Company waived the default of W. H. Ellis & Company would not establish a waiver as to the default of Lillie I. Ellis, April 10, 1907.

Is the six months limitation within which suit must be brought in order to recover under the bond a reasonable limitation?

In the case of *Appel v. Insurance Company*, 76 Ohio State, 52, the Supreme Court held in the first paragraph of the syllabus:

1914.]

Monfort v. Ellis.

“The parties to a contract of insurance may, by a provision inserted in the policy, lawfully limit the time within which suit may be brought thereon, provided the period of limitation fixed be not unreasonable.”

And in the second paragraph of the syllabus the court stated :

“A provision in a policy of fire insurance that ‘no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity. * * * unless commenced within six months next after the fire,’ is unambiguous and in a suit on the policy commenced more than six months after the date of the fire, will be enforced in accordance with the plain meaning of its terms, where no extrinsic facts are alleged excusing delay in bringing the suit.

Now it has been held repeatedly that surety companies which for a specified premium, undertake to indemnify for damages arising from the failure to perform a contract or the breach of a duty of an officer are in the same class as insurance companies, and this contract of suretyship, as the court views it, is in the nature of an insurance, and the rule laid down in the case just cited we think applies with full force and effect to the case at bar.

The rule laid down in the case just cited has been adopted in numerous other cases, a few of which are as follows: *Ins. Co. v. West*, 6 Ohio State, 599; *Ins. Co. v. McGookey*, 33 Ohio State, 555; *Stone Co. v. Drach Construction Co.*, 123 Fed., 746; *Leshner v. U. S. F. & G. Co.*, 239 Ill., 502.

Many other cases might be cited, but these, we think, are sufficient to establish the rule that a limitation of the character and kind contained in the bond of this surety company involved in this case is neither unreasonable as to time nor ambiguous in its character. Indeed, counsel for plaintiffs were frank enough to admit in the argument of the case and in their briefs that the limitation contained in this bond is one upon which the defendant, the Bankers Surety Company, has a right to stand.

It is contended, however, by counsel for plaintiffs that Lillie I. Ellis, in the completion of this building, was acting as the agent of the Bankers Surety Company and in its behalf and that

the Bankers Surety Company selected her as its agent and designated her to proceed with the completion of this building in accordance with its privilege under the bond above referred to.

The court is unable to concur with the plaintiffs' counsel in this claim. As heretofore stated, it does not appear from the proceedings of the trustees or the evidence in this case that the Bankers Surety Company ever intended or proposed to complete this building after the default of W. H. Ellis & Company, nor does it appear that the trustees of the memorial association understood or considered that the Bankers Surety Company was doing this work through Lillie I. Ellis. In fact, the communication of the Bankers Surety Company, made orally by Mr. Sprague and in his letter to the memorial association, indicate and state that it does not intend to proceed with the work, but was content to continue as surety for the performance of the work by Lillie I. Ellis.

It is further contended by counsel for plaintiffs that the act creating the memorial trustees, passed by the Legislature of Ohio, Section 8, precluded the trustees from making any contract for the erection of this building except in writing, and that any modification or alteration of the contract when once entered into must be made in writing.

There is no doubt of the correctness of the contention of counsel for plaintiffs in this regard. The trustees were governed by the law which brought them into existence and controlled and directed their movements and their conduct and directed the manner in which the contract should be made. All their contracts were to be made in writing, concurred in by a majority of the board of trustees after an advertisement in two newspapers published and of general circulation in the county; the contract was to be let to the lowest and best bidder; and when necessary in the opinion of the trustees, in the prosecution of such work, to make modifications or alterations in any contract, such alterations or modifications could only be made by order of the board, agreed upon in writing and signed by the contractor and the chairman and secretary of said board. But the thing that was done in the case at bar, under the law, by these trus-

1914.]

Monfort v. Ellis.

tees and by the parties, the Bankers Surety Company, Lillie I. Ellis and W. H. Ellis & Company, was done in writing. There was a proposal in writing by Lillie I. Ellis, the written consent thereto by the Bankers Surety Company, and a written resolution of the trustees of the memorial association to a modification of the contract with W. H. Ellis & Company—a substitution of Lillie I. Ellis for W. H. Ellis & Company.

The court having reached this conclusion that the Bankers Surety Company did not waive its right to stand upon the six months limitation in the bond and the suit, not having been brought within the time therein limited, the plaintiffs had no right to recover against the Bankers Surety Company, this court erred in overruling the motion of the Bankers Surety Company to arrest the case from the jury and instruct a verdict for the Bankers Surety Company. It also erred in instructing the jury to return a verdict against the Bankers Surety Company for the full amount.

The court is of the opinion that the motion for a new trial in this case on behalf of the Bankers Surety Company is well taken, and there being no question of fact under the evidence in this case for the jury to pass upon, the court is of the opinion that he should now do what he should have done at the conclusion of the plaintiffs' testimony, arrest the case from the jury and instruct a judgment in favor of the Bankers Surety Company for its costs. The court is of the opinion that this may be done under the authority of *Archdeacon, Admr., v. Cincinnati Gas & Electric Company*, 80 Ohio State, 27, wherein the court, in the third paragraph of the syllabus, says:

"Though issues joined in a case are triable to a jury, when the facts are conclusively determined in a manner not affected by material error, the application of the law to such facts is a function of the court and its exercise, when properly invoked, becomes a duty."

In that case the Supreme Court itself, after a verdict had been rendered in favor of the plaintiff and affirmed by the general term of the Superior Court of Cincinnati, reversed both

the special and general terms and entered a final judgment for the plaintiff in error, the defendant below.

If this may be done by the reviewing court, what reason may be urged why the same action may not be taken by the trial court?

On page 39 of the above cited case Judge Shauck, in passing upon this question, says:

“It is subversive of the public interests and promotive of no right of either party to continue a contest before a jury when nothing is involved but the application of the law to a state of facts conclusively established.”

In this case there appears to be nothing involved except the application of the law to a state of facts shown conclusively by the evidence and the admissions of the parties.

This court, in the case of *Sellaw v. Vine Street Congregational Church*, entered a judgment in favor of the defendant after a verdict in favor of the plaintiff had been rendered, and this judgment was affirmed by the circuit court upon error.

The same course was taken by Judge Hoffheimer, in the Superior Court of Cincinnati, in the case of *Kidd v. Traction Company*, in which a verdict was rendered in favor of the plaintiff and upon a motion for a judgment in favor of the defendant the court granted the same, and the ruling was sustained by the circuit court.

This is not a motion for a judgment on the pleadings and therefore the case cited by counsel for the plaintiffs, 85 Ohio State, 175, does not apply, but, the court is of the opinion that in the case at bar, if a motion for a judgment on the pleadings had been made, it would have been the duty of this court to grant the same, for the following reasons:

The answer of the defendant, the Bankers Surety Company, to the second amended petition of the plaintiffs, upon which this case was tried, sets up in its second defense the provision of the bond which provides that suit must be brought thereon to recover within six months after the breach of the contract. The reply to that answer fails to traverse these averments of the

1914.]

Monfort v. Ellis.

second defense of the defendant. and, therefore, this defense stands, under the pleadings, undenied, and if the facts therein set out are true, as they appear to be by reference to the bond. the Bankers Surety Company was entitled, on the pleadings, to go out of court with its costs.

However that may be, the court is not willing to rest the decision upon the question of whether or not this is a case wherein the defendant, the Bankers Surety Company, is entitled to a judgment on the pleadings inasmuch as that motion is not made in this case.

The court has been somewhat embarrassed by the decision of my associate, Judge Cushing, in passing upon a demurrer to an answer to a former petition in this case. Judge Cushing's decision will be found in 11 Nisi Prius (N.S.), 625. Among other things, he found from the pleadings that the Bankers Surety Company had designated Lillie I. Ellis as its agent to complete the work; that the owners, the memorial association, had consented thereto, and that by reason thereof the Bankers Surety Company would be liable, and that the six months limitation would not apply.

There can be no question about the correctness of this conclusion if Lillie I. Ellis was acting on behalf of the Bankers Surety Company, but, as this individual member of the court has found from the evidence and all the evidence in the case that she was not acting on behalf of the Bankers Surety Company but was acting on her own behalf to protect herself, because she had indemnified the Bankers Surety Company before it became surety for W. H. Ellis & Company, it appears to me that the conclusion which I have come to is not inconsistent with Judge Cushing's opinion. Judge Cushing was looking at the pleadings alone and there was an allegation in the petition and the amended petition of the plaintiffs that Lillie I. Ellis and the Bankers Surety Company assumed the performance of said contract and that the defendant, Lillie I. Ellis, with the full knowledge and consent and participation of the defendant the Bankers Surety Company, began the performance of said contract.

As I have stated, the evidence in this case does not disclose that Lillie I. Ellis began this work, or requested to begin the work, on behalf of the Bankers Surety Company, but on her own behalf and for her own protection, and that the plaintiff association consented that she be substituted for W. H. Ellis & Company in the completion of the contract.

But even if my conclusion might be at variance with that of Judge Cushing, nevertheless his ruling was on an interlocutory order, not upon final hearing, and neither he nor any other member of this court would or ought to be bound by a decision upon an interlocutory order when the case comes to be finally determined upon its merits and a final judgment entered.

In order that an error might not be perpetrated or that an injustice might not be done, I conceive it would be the duty of this court or any individual member thereof, upon final hearing of a case and the entering of final judgment, to enter such judgment as the law and evidence of the case warrant regardless of any findings or entries that might have been made on an interlocutory motion or demurrer.

The judgment of the court is that the verdict as to the Bankers Surety Company be set aside, and the court, upon its own motion, now renders judgment in favor of defendant, the Bankers Surety Company, that it go hence without day and recover its costs herein expended, and this judgment the court should have rendered upon the motion of the attorneys for the Bankers Surety Company at the conclusion of the plaintiffs' testimony.

Let an entry be drawn in accordance with this finding.

1914.]

Schroeder v. Schroeder.

INCOMPATIBILITY ON THE PART OF A WIFE WHICH A COURT WILL EXCUSE.

Common Pleas Court of Hamilton County.

WILLIAM SCHROEDER v. CHARLOTTE SCHROEDER.

Decided, October, 1914.

Divorce and Alimony—Husband and Wife Growing Apart Through Superior Opportunities of the Husband—Resulting Incompatibility Not Ground for Divorce.

Where a husband has prospered and begins to feel he has advanced to a higher place in life, and that his wife, absorbed in her household duties, has not kept pace with him, and as a consequence he treats her with less and less respect and confidence, and finally so irritates her by his conduct as to cause outbursts of temper on her part and behaviour toward him of which she had not theretofore been guilty, his prayer for a divorce on the grounds of neglect of duty and cruelty will be denied and alimony will be awarded to the wife.

Charles M. Leslie and Charles E. McCarthy, for plaintiff.
Spangenberg & Spangenberg and Charles F. Hornberger,
contra.

COSGRAVE, J.

The petition in this case alleges that both plaintiff and defendant are residents of this state and were intermarried on or about the 6th day of December, 1904. There is one child living, Thelma Schroeder, aged about seven years, born of said marriage.

Plaintiff alleged that he has fulfilled all his marital obligations toward the defendant and has always conducted himself as a true and faithful husband, but that the defendant in violation of her obligations towards him, has been guilty of gross neglect of duty in that the defendant failed and neglected to perform her household duties properly, and to properly take care of the house which this plaintiff provided; that on numerous occasions she neglected to prepare said plaintiff's meals; that she had

no affection for said plaintiff and was very quarrelsome and irritable; that the defendant has also been guilty of extreme cruelty in that she continually quarreled with the said plaintiff and harrassed him by her language and by her actions, so that she made life miserable, causing him great mental suffering; that upon a number of occasions the defendant called said plaintiff names which propriety forbids being set forth. That on the 8th day of February, 1914, and at divers times prior thereto, the defendant threatened to kill plaintiff; that on the 16th day of April, 1914, the defendant forbid the said plaintiff to return to his home and threatened to do this plaintiff bodily harm if he ever returned to their home. Wherefore he asks to be divorced, and he asks for the custody of the minor child, and for such other relief as may be proper.

To this the defendant has filed an answer, in which she denies specifically and generally each and every allegation contained in said petition relating to her conduct towards her husband. By way of cross-petition she alleges that since the date of their marriage, to-wit, on December 6th, 1905, she has at all times fulfilled her marital obligations towards said plaintiff and conducted herself as became a true and faithful wife, but that said plaintiff, in violation and total disregard of his marital obligations towards her, has been guilty of conduct which brought about the present separation.

She alleges that for the past four years said plaintiff has exhibited a cold and indifferent manner towards her, indicating that he no longer had any affection for her, and that, on various occasions, said plaintiff has used improper language towards said defendant and has called her improper names. Defendant further alleges that this conduct on the part of said plaintiff became unbearable to her, the said plaintiff was never satisfied with anything that said defendant tried to do or did; that he would complain and criticise her on every occasion and would not give her a civil response to questions which she would ask him; that he complained about the meals which said defendant would prepare, and on many occasions, would denounce said defendant as being an improper person to have the control and bringing up of their said minor child.

1914.]

Schroeder v. Schroeder.

Defendant further avers that this constant and mean conduct on the part of said plaintiff towards her, has caused her great humiliation and mental distress, and that by reason thereof, and owing to the ill-treatment as herein described, said defendant was forced to and did tell said plaintiff to leave the house on the 16th day of April, 1914.

Defendant further avers that she has, on frequent and numerous occasions, requested and begged said plaintiff to show a proper respect and affection for her, and has remonstrated with him about his conduct, but that said plaintiff has, at all times, ignored these entreaties and has been guilty of improper conduct towards her. Defendant further states that the separation was caused by the ill-treatment on the part of the said plaintiff, and further states that she is without any money or means with which to provide for herself and child with the necessities of life.

She alleges the plaintiff's employment and earning capacity of \$60 a week.

She alleges that the said plaintiff is the owner and holder of 150 shares of the Press Steel Car Company's capital stock, which company is a corporation, and that said stock has a par value of one hundred dollars per share; and that said plaintiff is also the owner and holder of ten shares of the capital stock of the Toledo Street Railway & Light Company, a corporation, of the par value of one hundred dollars per share.

She alleges that she is in fear that said plaintiff, or some one for him, may attempt to take possession of their said minor child, and that she, therefore, prays this court for an order enjoining said plaintiff from in any manner interfering with her or with her custody of said child.

Wherefore, defendant prays that upon the hearing hereof, the petition of the plaintiff may be dismissed; that she be granted reasonable alimony as well pendente lite as also permanent, upon the final determination of this cause, in addition to her attorney's fees; that the care, custody, education and control of their said minor child, Thelma, be confided to her solely and exclusively, and that said plaintiff be enjoined from

interfering with her or with her custody of said child, except under a reasonable and proper order of this court; and that he be enjoined from disposing of or in any manner encumbering the securities referred to herein, and also from drawing out any monies on deposit in his name in said Provident Savings Bank & Trust Company, and that said bank be enjoined from paying over to him any monies on deposit in his name, and for all proper general and equitable relief.

The pleadings are in effect substantially a charge of cruelty and gross neglect on the part of each of the parties herein. It appears from the testimony and from the pleadings that the parties were married on the 6th day of December, 1904. They have one child, Thelma, aged about seven years. It appears that at the time of said marriage the plaintiff was about ten years the senior of the defendant. They had known each other for a period of five years prior to the marriage; the courtship, ending in the marriage, covered a period of about two years. The plaintiff's sisters held him in very high esteem and deep affection, such as sisters very generally have for an only brother, but seemed to have a set aversion towards the defendant which manifested itself quite noticeably prior to the marriage. However at, and after the time of marriage there was no marked exhibition of this aversion on the part of the husband's sisters toward the defendant, except as displayed by their failure to visit the home of the newly married couple, or to show her the respect due her as the wife of their brother.

At the time of their marriage, the husband had accumulated quite a snug little sum of money from his earnings as a machinist. He furnished a small but comfortable home in a manner commensurate with his means and station in life. The defendant was about eighteen years of age at the time of her marriage, and had worked in one of the mercantile stores of our city for some few years preceding her marriage. The husband appears to have been a good, clean, industrious, thrifty man; the wife, a good, wholesome, virtuous woman, possessing some fair degree of musical ability. There is no question whatsoever, in this case, of improper conduct on the part of either the

1914.]

Schroeder v. Schroeder.

husband or the wife, as the world understands and judges improper conduct. They seem to have led a fairly contented and happy life until about a year or so before the separation, which took place on April 16th, 1914.

There had been differences between them prior to this time, but of no very serious character, seemingly being but the result of somewhat differing temperaments.

During the hearing of this case, which occupied some three days, a great many witnesses were examined on each side. The court will not attempt to review the testimony in detail, but will content itself with giving its effect on the judicial mind. A number of differences were brought into evidence. They were largely the resurrection of past incidents, which, at the time of their occurrence, were of no serious import, but when grouped together and presented to the consideration of the court, as grounds for a divorce, seemed of some moment until analyzed and placed in their true relationship as to the time and circumstances of their occurrence.

It is said that the wife occasionally used language which was designated as profane, and yet in the legal acceptance of the term it was not. It was rather a harsh and unbecoming mode of expression occasionally indulged in by both parties to this action. The language used was not of the choicest and it is to be regretted that such was the case. Conceding the truth of this charge, it does not furnish any sufficient grounds for dissolving the bonds of marriage. The language used was seemingly due to tempermental outbursts provoked by occurrences and conditions that were probably very irritating and provocative of emphatic language. It is true that the wife, and to a very great extent, if not always, joined therein by her husband, sought recreation and diversion in attending the moving picture theaters in their neighborhood, very generally going in each other's company and returning in the same manner, both equally enjoying these entertainments. It is possible that there was an over-indulgence in this very general diversion of the people of our city. It yet remains, however, for any court to say that such conduct tends in any way to constitute any ground for divorce under the laws of our state.

It appears that the husband was earning very good wages at the time of the marriage, and that they have doubled in amount, up to the present time, a tribute to his skill, ability and faithfulness in the performance of his duties. It would appear, however, that with increasing earning capacity, there was also an increasing exaltation of himself, until probably quite unconsciously, he arrived at that state of mind where he permitted himself to feel that he had reached such a superior sphere in life that by contrast caused his wife to appear inferior to him. This mental process quite often comes upon men who, by reason of intercourse in business affairs and with the world generally, acquire a greater breadth of knowledge and larger idea of life than the wife who is confined to her home by her household duties and the care of the family, and in times, she is made to, perhaps, feel that she does not measure up to the standards that her husband has reached. In the quickening developments of life prevailing at the present time, these conditions are becoming more and more frequent. In some jurisdictions, this change of conditions in the marital relations frequently designated as incompatibility, has been made the pretext for the granting of divorces; but so far as this court is concerned, it has not, and will not, adjudge any such state of affairs, of itself, to be a ground for divorce under the laws of our state. This court feels that when this condition arises, instead of the husband looking with disfavor upon the wife from his more seemingly favorable station, he should pull her up to his standard, or remain on an average standard with her so far as his domestic and family relations are concerned, whatever may be his attitude outside of his home.

A little incident occurring during the trial of this case has led this court to a fixed conviction that such is the case between this husband and wife, and this court is prepared to say in all candor, from his knowledge of human life and human affairs, that the husband who never permits himself to feel or to show any ground for the existence of a feeling of superiority as to his wife, or to make her feel that she is his inferior by reason of his increased business or seeming social success, prepares a

pathway for his future life paved with happiness and contentment both for himself and those around him.

Many little incidents brought into this case impressed the court that the estrangement herein existing is largely due to the above reason. The incident of the wife wanting to send the little girl Thelma to the German Lutheran Sunday School, and the husband wanting to send her to the Christian Church Sunday School, was not a serious matter at all, because the little girl would have been taught nothing but good in either Sunday School, but is a strong illustration of the fact that both parents were good people, and only differed in their method of manifesting their goodness. The mother desired the child brought up in the use of the German language, the language of her sires, as also the sires of her husband; the father did not seem to so desire. And so far as religious instructions are concerned, the mother's wish should have prevailed. I think we would have less use for the juvenile court if all the children of our city were sent to Sunday School in their younger days, and taught their duty to their God, according to whatsoever belief their parents might profess.

There is a pathetic side to the domestic life of these people that has impressed the court very deeply. It pertains to the events immediately preceding the separation and the seeming cause therefor, which, after all, is the only serious matter in this case. The evidence shows that this wife, week after week, brought her husband's earnings from their home in the extreme northwestern part of the city into the heart of the city and deposited the same in his name in one of the banks of our city; that this was continued week after week, year after year, the bank book remaining at all times accessible to both of them. When we also consider that the husband commencing six months after his marriage gave his pay envelope to his wife each week, and after the birth of the baby and when it arrived at an age that it was able to receive it from his hands, delivering it to the little child and the little child to the mother, thus showing on his part, love and affection for both, and the mother depositing as above stated, in an account in the husband's name, and

this continued until a few days before the separation, when for the first time in nearly nine years, without any word of explanation, he left the house without giving to his little child and wife his pay envelope, and when for the first time in their married life she was compelled to ask him for money for household expenses, and he crustily handed her a ten dollar bill out of sixty dollars, being one-sixth part of his weekly earnings for the care and maintenance of the home for himself, wife and child, it is not to be wondered at that this sudden and unexplained withdrawal of confidence and faith in her whom he had trusted all these years, caused an outburst of indignation, impelling resentment from the depths of her wounded heart. Is it surprising she threw the ten dollar bill at him as he was leaving the home? The court can not help but feel, as appears in evidence, that the disdainful glance, the contemptuous look, the slighting if not insulting words that he had been applying to her for the six or eight months preceding this event, produced a culminating effect on that day, and that the love chords uniting their two hearts were withered, if not broken, by this last act showing want of confidence in her honesty and good faith and without any reason therefor.

The court is not surprised that she resented it in the manner in which she did. If that morning, he had examined the family bank book and observed its growth from hundreds to thousands of dollars, his earnings it is true, but saved by her, he would not have acted as he did. It would have impressed him, as it did the court, not only as a silent tribute to his industry, but also to her thrift and economy.

If there was any cruelty in this case, it was cruelty on the part of the husband, and not on the part of the wife; if there was any gross neglect of duty, it was on his part and not on hers. By the testimony the plaintiff has utterly failed to make out a case against his wife, and the prayer of divorce on behalf of the husband will be denied.

When all is said and done, the court is in doubt whether the plaintiff fully realized the effect of his course of conduct towards the defendant. The custody of the child will be awarded to the

1914.]

Schroeder v. Schroeder.

mother with the right to the father to visit at such times as may be agreed upon in the decree to be submitted herein. The husband will pay to his wife for maintenance and the maintenance of the child, the sum of \$25 per week until the further order of this court, and pay an attorneys' fee of \$250 to Messrs. Spangenberg and Hornberger, as counsel for defendant, for services rendered since the beginning of this action.

The court will not now make a final disposition as to the alimony to be awarded to the wife in gross, but will delay the same,

I delay final disposition in the case for the reason that it would be very pleasing to this court if the husband and wife would both take counsel with their best selves and agree to forget and forgive some of the past disagreements, not only for their own sakes, but for the sake of their beautiful little daughter, Thelma, agreeing to live together again; and believe me in so doing, you will find in the years to come a greater degree of happiness than if you continue in your present state of disagreement. This may be a vain hope on the part of the court, but while there is a hope, the court will cling to it. I believe from what I have observed during the trial, that at the time of your marriage, you truly and sincerely loved each other and continued to do so until at least a year before your estrangement. I believe that love exists between you still, somewhat dimmed it may be, but not extinguished. You are both good people: rekindle its fires before it is too late.

ACTIONS UNDER THE FEDERAL EMPLOYERS' LIABILITY LAW.

Common Pleas Court of Cuyahoga County.

MIKE HUSZTY V. ERIE RAILROAD COMPANY.

Decided, October 10, 1914.

Jurisdiction—Of State Courts Where the Action is Under the Federal Employers' Liability Act—Verdict of Jury Must be Unanimous.

Our state courts have jurisdiction to entertain actions brought under the federal employers' liability act, but in such actions the verdict of the jury must be unanimous.

STEVENS, J.

Opinion on demurrer on the ground of want of jurisdiction.

The action is based upon the federal employer's liability act. It has been decided, beyond question, that where the federal act applies, an action can be maintained only as based upon it, and that all state statutes on the same subject are excluded by reason of the supremacy of the federal act.

The federal Constitution provides that, in suits at common law, the right of trial by jury shall be preserved; and it is held that Congress has no power to enact legislation which impairs that right. Trial by jury has been held to mean a jury of twelve men, and a verdict of a jury is the unanimous verdict of twelve men. It is claimed, then, that the courts of the state of Ohio have no jurisdiction to entertain an action brought under the provisions of the federal employer's liability act, because, while the federal laws and Constitution provide for a jury trial as known to the common law, the Constitution and laws of the state of Ohio require that in all civil actions the jury shall render a verdict upon the concurrence of three-fourths or more of their number, and that when three-fourths or more of the jury have arrived at a conclusion, the verdict is complete. It is claimed that this court is in a dilemma, because the cause of action in the case in question exists solely by an act of Congress, is within the guarantee of the

1914.]

Husztly v. Railway.

seventh amendment to the United States Constitution, and yet the court is bound by the Constitution and laws of the state of Ohio, which provide for a verdict of three-fourths of the jury. Counsel for the defendant urge that the court could not hear this case without violating either the law and Constitution of the United States, by permitting a three-fourths jury verdict, or violating the law and Constitution of the state of Ohio by requiring a unanimous verdict.

I think the escape from this dilemma is clear upon a consideration of Article I, Section 5 of the Constitution of Ohio, in connection with Sections 11455, 6 and 7 of the General Code. The section of the Constitution referred to provides, in its first clause, that the right of trial by jury shall be inviolate. That provision means, beyond question, trial by a jury of twelve men, as known to the common law, whose verdict must be unanimous. But the Constitution further provides in that section as follows: "*except that in civil cases laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.*"

It is clear, therefore, from the constitutional provision, that in criminal matters it is entirely beyond the power of the Legislature to authorize trial by jury in any way other than that known to the common law. As to criminal matters, the *right of trial by jury* is inviolate. This would remain true of civil actions if the Legislature had not exercised the power granted it under the Constitution and provided that in *all* civil actions a jury shall render a verdict upon the concurrence of three-fourths or more of their number. Unquestionably, the Constitution of Ohio did not attempt to authorize the Legislature to provide for a three-fourths verdict of the jury in any matters concerning which it did not have power to legislate. It is equally certain that the Legislature of Ohio has no power to legislate with reference to those matters in which the Constitution and laws of the United States are paramount, and they have not attempted to do so.

"When Congress has exerted its paramount legislative authority over a particular subject of interstate commerce, state

laws upon the same subject are superseded." *Railway Company v. Harris*, 234 U. S., 412, syllabus 3.

The provision of Section 11455 of the General Code means precisely the same as though the words following in parenthesis were contained in it, and might be read as follows:

"In all civil actions (concerning which the Legislature has any power to legislate) a jury shall render a verdict upon the concurrence of three-fourths or more of their number. (In all other actions the right of trial by jury remains inviolate.)"

These would be, of course, in a sense absurd provisions to insert, but they implicitly exist in that section of the General Code.

I conclude, therefore, that actions brought under the provisions of the federal employer's liability act may be entertained by the courts of Ohio, but that the unanimous verdict of the jury must be required.

1914.]

Eppinger v. Cincinnati.

THE OHIO STANDARD OF DRY MEASURE UPHELD.

Common Pleas Court of Hamilton County.

AL EPPINGER ET AL V. THE CITY OF CINCINNATI ET AL.

Decided, January 23, 1914.

Constitutional Law—Standards of Weights and Measures—Right of the State to Establish—Validity of Section 6415.

The power which is vested in Congress by the Federal Constitution to regulate weights and measures, does not extinguish the authority of the states over the same subject until Congress sees fit to exercise the power so conferred. In the meantime each state is at liberty to establish its own standards, and Section 6415, General Code, as amended (103 O. L., 139), providing subdivisions of the half bushel, is a valid enactment.

Alfred Bettman, City Solicitor, for the demurrer.
Mallon & Vordenberg, contra.

GEOGHEGAN, J.

Heard on demurrer to petition.

This action is brought primarily to test the constitutionality of an act of the General Assembly of the State of Ohio, known as Section 6415, General Code of Ohio, as amended March 12, 1913, and found in 103 Ohio Laws, at page 139.

The act reads as follows:

"SECTION 1. That Section 6415 of the General Code be amended to read as follows:

"Sec. 6415. The peck, half-peck, quarter-peck, quart and pint measures for measuring commodities other than liquids, shall be of the interior dimensions and capacities as follows, to-wit: the peck measure shall be eleven inches in interior diameter, five and five-eighths inches in interior depth, and shall contain five hundred and thirty-seven and six-tenths cubic inches; the half-peck measure shall be eight and one-half inches in interior diameter, four and three-quarter inches in interior depth, and shall contain two hundred sixty-eight and eight-tenths cubic inches; the quarter-peck measure shall be six and five-eighths

inches in interior diameter, three and seven-eighths inches in interior depth, and shall contain one hundred and thirty-four and four-tenths cubic inches; the quart measure shall be five and five-sixteenths inches in interior diameter, three inches in interior depth, and shall contain sixty-seven and two-tenths cubic inches; the pint measure shall be four and one-half inches in interior diameter, two and nine-twenty-fifths inches in interior depth, and shall contain thirty-three and six-tenths cubic inches.

"SECTION 2. That said original Section 6415 of the General Code be and the same is hereby repealed."

The plaintiffs contend that the said act is illegal and void and beyond the power of the Legislature to enact, because the exclusive power of fixing the standard of measures is vested in the Congress of the United States by virtue of Clause 5 of Article I of Section 8 of the Federal Constitution, which gives Congress the power "to coin money, to regulate the value thereof and of foreign coins and fix the standard of weights and measures."

It is conceded by counsel for the city of Cincinnati that if Congress has acted and has fixed the standard of dry measure, that this attempt on the part of the Legislature to fix the standard of the smaller dry measures, as set forth in the act, is invalid, and beyond the powers of the state government. But, he contends that Congress has not fixed these standards and that therefore the inherent right of the state to fix the standards remains with the state and that the act in question is not beyond the powers of the state.

That the grant in the Federal Constitution to Congress to regulate weights and measures does not extinguish the rights in the states over the same subject until Congress shall have exercised the power conferred, is clearly pointed out by the Supreme Court of Pennsylvania in *Weaver v. Fegely & Brother*, 29 Pa. St., 27. At page 30, the court in discussing this proposition uses this language:

"The United States courts have jurisdiction over controversies between citizens of different states, but no one has ever doubted

the jurisdiction of the state courts over the same parties. To hold that the mere grant of power to the federal government over any subject extinguishes state authority over the same subject, would invalidate thousands of judgments rendered by state courts, in controversies between citizens of different states. In every state in the Union weights and measures have been constantly governed either by a standard established by a state statute, or by the common law of the state. The power of each state to establish its own common law on this subject has never been denied. If the states have this power, they certainly have the power to enact statutes. The power being acknowledged, it is not for the federal government to interfere with the *manner* of exercising it. To deny the existence of this authority now, would overturn the practice which has been uniformly acted on by all the states during the whole period of their political existence. It would throw all past transactions into confusion, and leave the business community no guide whatever for the future; for there is no certainty that Congress will ever deem it expedient to fix a standard. Chief Justice Tilghman, in *Farmers' and Mechanics' Bank v. Smith*, 3 S. & R., 69, stated a fact which no one has ever denied, when he declared that 'the states have regulated weights and measures at their pleasure, without objection.' Their right to do so, until Congress shall act on the subject, admits of no doubt."

This case was decided in 1857.

The same proposition was laid down in *Higgins v. California P. & A. Co.*, 109 Cal., 304, at page 310 (October, 1895); in *Harris v. Rutledge*, 19 Iowa, 388, at page 390 (December term, 1865); *Caldwell et al v. Lawson*, 4 Metcalf, 121, at 123 (Court of Appeals of Kentucky, Jan. 17, 1863).

Freund, in his excellent work on the Police Power, Section 273, says:

"The earliest legislation for the prevention of fraud relates to weights and measures. It goes back to Anglo-Saxon times, and forms part of Magna Charta. The Constitution of the United States provides for uniformity of weights and measures by giving Congress power to fix their standard; but Congress has enacted no compulsory legislation in execution of this power. It merely has passed an act authorizing the use of the metric system; and the federal government supplies the several states with certain standard weights and measures as a matter of favor

and accommodation under a resolution of Congress of June 14, 1836. Until superseded by act of Congress the regulation of weights and measures therefore devolves upon the states, and is provided for by state legislation."

In 40 Cyc., page 880, this section has been discussed as follows:

"Under the Constitution of the United States, Congress is given power to establish uniform weights and measures. This power it has never exercised. And until it is exercised the respective states may, for themselves, regulate weights and measures. By a joint resolution, adopted June 14, 1836, provision was made for sending to each state a full set of standards. These standards were early adopted by some states, and have continued in force ever since. And in every state in the Union weights and measures have been constantly governed either by a standard established by a state statute, or by the common law of the state."

It must be apparent, therefore, that the great weight of authority is for the proposition that Congress has not acted upon this subject in such a manner as to abolish the state's right to control the subject by legislation. Congress by the act of May 19, 1828, adopted a brass troy pound weight, procured in London by the Minister of the United States, for the use of the mint at Philadelphia. On May 28, 1830, the Secretary of Treasury reported the result of his inquiries into discrepancies in the weights and measures as actually used in the various custom houses, and also that he had adopted a uniform practice in conformity with the details given, which indicated conformity to the old English standard, and in June, 1836, Congress enacted a joint resolution directing the Secretary of the Treasury to cause a complete set of all the weights and measures adopted as standards, then made or in process of manufacture for the use of the several custom houses and other purposes, to be delivered to the governor of each state in the Union, or such person as he might appoint, for the use of the states respectively, to the end that a uniform standard of weights and measures might be established throughout the Union.

1914.]

Eppinger v. Cincinnati.

On March 3, 1881, the secretary was required to deliver to the governor of each state, for the use of agricultural colleges, and to the Smithsonian Institute, a complete set of all the weights and measures adopted as standards.

On July 11, 1890, an appropriation was made for the further construction and the adjustment of standard weights and measures to be supplied to the custom houses and other offices of the United States, and for several states.

Most of these acts as well as the act of July 28, 1866, providing for the use of the metric system in determining weights and measures, and the act of March 3, 1901, to establish a uniform bureau of standards, are found in 7 Federal Statutes Annotated, at page 1107, *et seq.* See also *Thompson v. District of Columbia*, 21 Appeal Cases, D. C., 395.

I have examined at some length the legislation upon this subject, and have come to the conclusion that while the federal government thought its Congress has acted at various times with reference to weights and measures, there has been no attempt on the part of the federal government to establish a compulsory standard of weights and measurements, and that until the federal government does act in that respect, the power remains in the state to establish its own standards of weights and measures. Therefore, it would seem that Section 6415, General Code, as amended, is a valid and constitutional enactment.

Some question arose during the oral argument as to Section 6416, General Code, which reads:

“Articles usually sold by heaped measure shall be heaped in a conical form as high as such articles permit.”

No mention is made, however, of this section in the briefs that have been submitted by counsel, and the city solicitor frankly admits that this section is of doubtful constitutionality. I agree with him, but as the petition is framed for the purpose of enjoining the city of Cincinnati and its sealer of weights and measures from interfering with the use by plaintiffs of certain measures that are not in conformity to the standards as fixed by Section 6415, General Code, I do not think it necessary to

pass upon the validity of Section 6416. That may be taken up when a case arises wherein a violation of that provision is charged.

Having thus determined that Section 6415 is a valid and constitutional enactment, it would seem that the state has the right to enact legislation seeking to compel the use of the standards as fixed, and to prevent even by confiscation the use of measures not in conformity with the standards. Therefore, the city sealer was right in seizing and taking away the measures set forth in the petition.

The demurrer, therefore, will be sustained.

LIEN OF MORTGAGE COVERING ONE CO-TENANT'S SHARE.

Common Pleas Court of Hamilton County.

KNECHT V. KNECHT.

Decided, 1913.

Partition—Mortgage Executed by One Co-Tenant Before Beginning of Partition Suit—Superior to Claim for Rents and Profits.

The lien of a mortgage executed by one co-tenant prior to the beginning of a suit for partition and recovery of rents and profits under Section 12406, is superior to the claim of other parceners for rents and profits decreed in the same action.

Powell & Smiley, for motion.

Peck, Schaffer & Peck, contra.

MAY, J.

This matter is submitted to the court on the motion of one of the co-tenants for an order directing the sheriff to pay to said co-tenant a sum of money found by previous order of the court to be due such co-tenant from the other co-tenant for rents and profits collected before the partition suit, for distribution to the mortgagee, the Western German Bank, of the amount found

1914.]

Knecht v. Knecht.

due it on its mortgage executed before the bringing of the partition suit.

It is contended by the claimant under Section 12046, General Code, that this order should be granted for the reason that such co-tenant has a lien on the whole property and especially on the interest of his co-tenant for rents and profits so collected. The matter has never been determined as far as I have been able to find, by any Ohio court.

Counsel for claimant cited in support of the motion *Beck v. Kallmeyer*, 42 Mo. App., 563. This case is squarely in point and is the only case that directly decides the question.

In the case of *Peck v. Williams*, 113 Ind., 256, it was not necessary to decide this point, and while the language of the court is broad enough to sustain the contention, nevertheless it is a mere *dictum*.

The case of *Arnett v. Munnerlyn*, 71 Ga., 14, follows the same case as reported in *Hill v. Reeves*, 57 Ga., 32, which also sustains the contention of counsel.

It will be noticed in the syllabus in *Arnett v. Munnerlyn*, *supra*, that it is held that the matter is *res judicata* as far as the case before it was concerned. Whether the Georgia court would follow this is doubtful. (See the case of *Pope v. Tift*, 69 Ga., 741, third syllabus.)

Some of the nisi prius cases in New York seem to hold in favor of the motion, but no case in either the appellate division or court of appeals of New York sustains this view. The weight of authority is against the motion.

While it is true that there is no Ohio case directly in point, there is, however, a decision of the federal court of the southern district of Ohio, deciding the exact question involved.

In *McArthur v. Scott*, 31 Fed. Rep., 521, Mr. Justice Jackson, then sitting as circuit judge in this district, held that the lien of a mortgagee executed by one co-tenant prior to the institution of a suit for partition and for the recovery of rents and profits collected by the other co-tenant is superior to the claim for rents and profits decreed in such suit. In the course of his opinion the learned judge says:

"The general rule, which is sanctioned by the great weight of authority, is that the equitable claim of one tenant in common against his co-tenant, for rents and profits received in excess of his share, is superior only to subsequent mortgages or liens; that prior mortgagees or incumbrancers are not necessary or proper parties to the partition proceedings between co-tenants; and that the rights of such prior mortgagees are not to be affected by such partition proceedings."

One of the best considered cases on the subject is *Vaughan v. Langford*, 81 S. C., 282. At page 287 the court says:

"Such liens (for rents and profits collected) would be indefinite in amount, and not disclosed by public records, upon which third parties in dealing with the owners of property ordinarily have a right to rely. They would greatly injure tenants in common by impairing the market value of their shares and interests, because of the apprehension on the part of those contemplating purchasing such interests or otherwise dealing with them, that the claims for rents might be established as superior liens."

Some of the other authorities sustaining the view that the lien of a co-tenant for rents and profits is not superior to a mortgage executed prior to the bringing of the partition suit are *Burch v. Burch*, 82 Ky., 622; *Burns v. Dreyfus*, 69 Miss., 211, a very well considered case; *Flack v. Gosnell*, 76 Md., 88; *Flack v. Zanderson*, 91 S. W. Rep. (Tex.), 348. See also 38 Cyc., 72; 2 Jones, Liens, 1155, 1156.

The motion will be overruled.

1914.]

State v. Schroder.

**PRESUMPTION THAT EVIDENCE WAS HEARD UPON WHICH AN
INDICTMENT HAS BEEN BASED.**

Common Pleas Court of Hamilton County.

STATE OF OHIO V. FRED SCHRODER AND DESHA FALKENSTEIN.

Decided, October 1, 1914.

*Criminal Law—Conclusiveness of Finding by Grand Jury with Respect
to the Evidence Upon which an Indictment Has Been Returned—
Plea in Abatement Held Subject to Demurrer—Section 13622.*

A plea in abatement to an indictment alleging that the grand jury which returned the indictment did not have before it or within the knowledge of its members any evidence connecting the defendant with the crime alleged, does not set up a defect in the record by facts extrinsic thereto, and a demurrer to such a plea must therefore be sustained.

Thomas L. Pogue, Prosecuting Attorney, and *Simon Ross, Jr.*, Assistant Prosecuting Attorney, for the state.

Darby & Benedict and *Eugene Adler*, contra.

GORMAN, J.

Decision on demurrer to plea in abatement.

An indictment has been returned against the defendants, charging them and each of them with blackmail under Section 13384, General Code. Heretofore a motion to quash was filed herein by the defendant Falkenstein and the same was overruled. There is now filed by him a plea in abatement under favor of Section 13622 of the General Code, which reads as follows:

“A plea in abatement may be made when there is a defect in the record shown by facts extrinsic thereto.”

To this plea in abatement a demurrer has been filed by the state, and the court is now called upon to determine whether or not the plea in abatement is good as against the demurrer.

In substance, the plea in abatement, duly verified by the defendant Falkenstein, sets out that the state ought not to further prosecute the said indictment against the said defend-

ant, because he says there is a defect in the record not apparent upon the face thereof, in this, to-wit: that there was no legal, admissible, relevant or material testimony or evidence against him, tending in any way to show or prove his guilt of the alleged crime, offered or presented to the said grand jury or heard by the said grand jury; and further that said indictment against said Falkenstein was found and returned by said grand jury wholly without any evidence being offered or presented to said grand jury as against said Falkenstein; and that the members of said grand jury had no knowledge or information concerning the said Falkenstein relating to said alleged offense upon which said grand jury could legally return an indictment against him.

The point of the demurrer to this plea in abatement is that said plea does not state a defect in the record not apparent upon the face of the record; in substance that the plea is not sufficient in law to warrant the state in replying thereto or the court in hearing the matters therein set out.

At the outset we are confronted by the question of whether or not a plea in abatement will reach a situation or condition set out in the plea in the case at bar.

There is no Ohio authority on which the court can rely either to sustain or overrule the demurrer, as the question does not appear to have ever been squarely raised in this state. There have been pleas in abatement which went to the point of ascertaining whether or not the grand jury was properly constituted, properly sworn, or whether there was a sufficient number of grand jurors, or whether they had been properly charged by the court. But, as has been said, there is no case which determines whether or not the court on a plea in abatement may determine whether or not there was sufficient evidence to warrant the grand jury in indicting or in determining whether or not there was any evidence before the grand jury or any knowledge on the part of the grand jurors which would justify an indictment.

The plea in abatement is one that at common law was frequently used, but as has been said in *Harris on Criminal Law*, Force's Edition, page 305:

"A plea in abatement is another dilatory plea, formerly principally used in the case of the defendant being misnamed in the indictment; * * *. The plea is now, however, virtually obsolete. It has been enacted (in England) that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition, if the court be satisfied of the truth of the plea. The court will cause the indictment or information to be amended, and will call upon the party to plead thereto, and will proceed as if no such dilatory plea had been pleaded." Citing 7 Geo. 4, c. 64, Section 19.

By statute in this state (Section 13624, General Code), it is provided, among other things, that when a plea in abatement is adjudged in favor of the accused he may be committed or held to bail in such sum as the court requires for his appearance at the first day of the next term of such court. So that, even if the plea in abatement be decided in his favor he is nevertheless subject to re-indictment for the offense sought to be charged in the defective indictment.

This plea being verified, if it is to be heard upon the merits must be heard before a petit jury of twelve men and not heard by the court; that is, if there be replication to the plea it would appear that the issuable facts are triable to a jury. See *State v. Easter*, 30 Ohio St., 548.

We then have the anomalous situation of a petit jury of twelve men sitting in judgment upon the conclusions and findings of a grand jury of fifteen men on an indictment, and determining whether or not the grand jury had any evidence or knowledge upon which to base the indictment or had sufficient knowledge upon which to base the indictment.

Outside of this state the authorities are not in harmony upon the question. In some states such a plea as this has been allowed and in others it has been denied.

It is said in Section 124, *Joyce on Indictments*, that the question as to the conclusiveness of the finding of the grand jury in respect to the evidence upon which the indictment is found is one upon which the courts are not fully in harmony.

In the following cases it has been held that a plea in abatement may be employed to raise the question of whether or not

there was any evidence before the grand jury or any knowledge on the part of the grand jurors upon which the indictment was based.

In *Royce v. Oklahoma*, 5 Okla., 61, this question was determined on a motion to quash and set aside the indictment on the ground that it was found by a grand jury without legal and competent evidence but upon hearsay testimony. But there was a statute in Oklahoma which we think sufficient to warrant the court in ruling as it did rule in that case. (See Sections 5049, 5050, Laws of 1895, Statutes of Oklahoma.)

To the same effect is the case of *State v. Froiseth*, 16 Minn., 296. But in that case it will be observed that the indictment was set aside because the defendant was required by the grand jury to testify involuntarily touching the criminal charge against him, and the court, we think, properly said that the indictment should not be founded upon evidence furnished by the accused himself upon compulsion because it was violative of his constitutional right.

To the same effect is the case of *O'Shields v. State*, 92 Ga., 472, in which it was held that a motion to quash an indictment, made on the ground that the same was found and returned by a grand jury before whom no evidence had been introduced against the accused, would be entertained if there was any evidence to support the plea, but that a refusal to quash the indictment on these grounds was properly made when there was no evidence offered tending to support the plea.

The following authorities outside of this state hold that the indictment of the grand jury when apparently regular upon its face is conclusive presumption that there was evidence before the grand jury upon which the indictment was returned and that there was sufficient evidence to warrant the indictment and that no inquiry can be made upon those points.

Sparrenberger v. State, 53 Ala., 481, in which it is said in the third paragraph of the syllabus:

"It is not matter of a plea in abatement to the indictment that it was found without evidence of witnesses, or without legal documentary evidence, or returned into court without the concurrence of twelve grand jurors."

1914.]

State v. Schroder.

In case of *State v. Fasset*, 16 Conn., 457 and 458, it was held in the third paragraph of the syllabus:

“It is the policy of the law, in the furtherance of justice, that the preliminary inquiry before a grand jury should be conducted in secret. No evidence, therefore, will be received, for the purpose of vitiating an indictment, either from the grand jurors, or from the witnesses before them, or from any other person required by law to be present, as to the evidence given on such inquiry.”

In this case it was sought to raise the question of the sufficiency of the evidence before the grand jury and the fact of whether or not there was any evidence upon which the indictment was based by motion to quash, which was the only method in that state of raising the question.

In the case of *State v. Dayton*, 23 N. J. L., 49, it was held in the sixth paragraph of the syllabus:

“That an indictment was found by the grand jury upon illegal evidence, or without legal evidence, can not be taken advantage of by the defendant on a motion to quash by plea in abatement, or in any other way.”

Squarely holding in this case that the question can not be raised as it is sought to be raised by the defendant in this case.

In the case of *Smith v. State*, 61 Miss., 754, it was held in the first paragraph of the syllabus:

“The court can not inquire into the character of the evidence before the grand jury upon which an indictment is found.”

If it be true that the court can not inquire into the character of the evidence, then it would appear that the court can not inquire as to whether or not there was any evidence before the grand jury.

In the case of *State v. Boyd*, 2 Hill (S. C.), Part II, page *288, it was held in the second paragraph of the syllabus:

“The court will, in no instance, inquire into the character of the testimony which has influenced the grand jury in finding the indictment, with a view to quash the indictment.”

In the case of *State v. Woodrow*, 58 W. Va., 527, it was held in the fourth paragraph of the syllabus that an indictment can not be quashed because it rests, in whole or in part, on incompetent evidence. In discussing the question under consideration in that case the court says:

"The court can not say on what the grand jury found its indictment, or how far the incompetent evidence operated, or on what members it operated. You can not call each member and ascertain on what evidence he formed judgment. Next, take the case where the indictment rests alone on evidence of an incompetent witness. In such cases some authorities say that the indictment must go; but even here why shall we not say that on the trial the state may furnish other evidence ample to sustain its indictment which was not before the grand jury? The indictment is only a charge, to be sustained by competent evidence upon the trial. So the court said in *State v. Dayton*, 53 Am. Dec., 270. The accused can have the evidence, if incompetent, excluded on the trial. True, it is hard on him to be put to trial upon an indictment resting alone on incompetent evidence; but grand juries are not good judges of competency, and oftentimes do not consult the court. It would be very bad practice, endless inconvenience, to have a full preliminary trial of competence of evidence before the grand jury in many cases. How far would the practice go? Does the inconvenience to the accused justify the institution of such a practice? Are not his rights fully vindicated by his right to exclude improper evidence on the trial.

"Therefore, we conclude that the plea in abatement was properly rejected."

It is contended by counsel for the state that the question under consideration has been determined by our Supreme Court in the case of *Turk v. State*, 7 Ohio, Part II, page 240. But the court is not satisfied that the question presented in the case at bar is there presented and would not be satisfied to rest a decision upon that case.

Counsel for the state further cite the case of *State v. Woolard et al*, 12 N.P.(N.S.), 395, a decision by Judge Nicholas of the Common Pleas Court of Licking County, in which he says on page 397 that the question of whether or not there was sufficient evidence before the grand jury to warrant their returning

1914.]

State v. Schroder.

an indictment against the accused can not be inquired into. But that case arose upon an application for admission to bail of the accused, and we do not think that it would warrant us in holding it an authority in favor of the state on the proposition now before the court.

In the case of *State v. Rhoads*, 81 Ohio St., 397, the Supreme Court, in passing upon the question of whether or not the accused was entitled to evidence before the grand jury on the presentation of the case upon which the indictment was returned, held that he was not entitled to this evidence and that the secrets of the grand jury should be kept inviolate, and that the state was not bound to furnish evidence to the defense upon which the indictment was based. The state can not compel the prisoner at the bar to submit his private papers or memoranda to the state for use or even examination, for he can not be required to testify in the case, and for the same reason the accused should not be allowed to require the prosecutor to furnish him evidence.

In *Bishop's New Criminal Procedure*, Vol. 1, Sections 791 to 793, inclusive, it is said that from the nature of the plea in abatement, as already stated, it is obvious that there is a wide scope for its use. But practically it is much curtailed by the more convenient motion to quash and by other steps adapted to particular cases. So that it is not often heard of in the criminal law, except in answer to two classes of defects in the indictment and disqualification of the grand jury or any member thereof.

In conclusion, the court is of the opinion that in view of the conflicting authorities upon this question, it would not be wise to establish a precedent in this state, which might work great harm and inconvenience to the state and subserve no practical benefit to the accused, to permit a plea in abatement to be brought to trial before a jury of twelve men upon issues joined as to whether or not there was any evidence before the grand jury or any knowledge on the part of the grand jurors which would warrant the return of an indictment. If such practice shall be adopted in this state, then in every case in which an

indictment is returned the court can readily see that a plea similar to that made in this case can be filed and an inquiry had by twelve men, a petit jury, as to whether or not there was any evidence before the grand jury upon which the indictment was returned. The integrity, honesty and good faith of the grand jury, would thus be open to attack by a petit jury. There would practically be two trials for the accused, one upon the plea in abatement before a petit jury, and if the petit jury decided against him he would be entitled to another trial before the petit jury upon the issues of guilty or not guilty.

In view of the conflict of authorities outside of the state, and the language of the decision in 7 Ohio, *supra*. the court is disposed to find that the weight of authority and the reason of the case is with the state in the case at bar, and that the plea in abatement upon the ground set out should not be allowed; that it is not well taken, and that the demurrer should be sustained; all of which is accordingly done.

1914.]

Trust Co. v. Coal Co.

**CASES WHICH ARE EXEMPT FROM OPERATION OF THE
NEW JURY LAW.**

Common Pleas Court of Franklin County.

THE CITIZENS SAVINGS & TRUST CO. v. GIBSON-SPENCE COAL CO.

Decided, October, 1914.

Verdict—By Three-Fourths of the Jury—Application of the Act Relating Thereto—Recent Holding by the Supreme Court Distinguished—Claim That the Notes Sued on Were Given for a Consideration Which Failed—Not a Defense, When—Section 11455 as Amended.

1. Under the General Code 26, providing that when an amendment to a statute relates to the remedy it shall not affect causes of action existing at the time of such amendment unless otherwise expressly provided in the amending act, the provisions of amended Section 11455 authorizing a verdict upon concurrence of three-fourths of the jury, does not apply to a cause of action stated in an action commenced after May 14, 1913, the time the amendment became operative, when the cause or causes of action accrued long prior to that date and were existing at the time of such amendment which contained no language expressly making it applicable to such existing causes. (*Elder v. Shoffstal*, decided by Supreme Court, June 16, 1914, 89 Ohio State, affirming 17 C.C.(N.S.), 182, distinguished; second paragraph of syllabus not applicable.)
2. A claim that notes were given in consideration of future delivery of coal which fails, is not a defense to an action by a bank which purchases the same before maturity without notice of such consideration or engagement between the parties.

D. H. Armstrong and *A. C. Harvey*, for plaintiff.

M. L. Bigger, contra.

KINKEAD, J.,

This case has been tried twice. The action is to recover \$1,177.96 on two promissory notes. The defense was that the plaintiff took the notes with knowledge that they were given as advance payments for coal to be delivered in the future, the facts showing that the payee was unable to deliver the coal. In the

first trial a non-suit was ordered because it was not shown that the plaintiff was not a *bona fide* holder of the note sued upon.

A new trial was granted because the court entertained a suspicion from the evidence that all facts and circumstances had not been disclosed in respect to the question whether the bank had notice of the equities. The new trial was granted also out of an abundance of precaution on the ground that it might properly be a question for the jury to draw an inference from the circumstances the fact of such knowledge.

On second trial the evidence developed the facts and circumstances much more fully, shedding all the possible light upon the question whether the bank was chargeable with knowledge of the claims of defendants. The verdict of the jury was that it was not, the finding being for the plaintiff.

On motion for new trial it strongly urged that error was committed in not charging the jury that it could render a verdict by a three-fourths vote. It is also claimed that the court erred in its charge to the jury.

The action was commenced July 8, 1913.

The first cause of action *accrued* and was *existing* April 10, 1913. The second cause of action *accrued* and was *existing* March 26, 1913.

It is urged that the case of *Elder v. Shoffstall*, decided by the Supreme Court June 16, 1914, OHIO LAW REPORTER, June 29, 1914, requires a reversal of the action of the court because the jury was required to render a unanimous verdict.

The course pursued in this case is the one followed by this court in all its branches upon mature reflection and consideration. It is the rule followed generally by the trial courts. The trial courts had long had the benefit of the case above cited as reported by the court of appeals in *Shoffstall v. Elder*, 17 C.C. (N.S.), 182. The Supreme Court affirmed the decision, reaching the same conclusion that the amendment to the jury law which became effective May 14, 1914, did not affect actions pending prior to that date. That action was commenced March 21, 1913. It went to trial May 6, 1913, the court charging the jury May 20, 1913. The court applied the amended jury law, the verdict

1914.]

Trust Co. v. Coal Co.

being rendered by only ten jurors. This action was reversed by the court of appeals because the amended act did not affect pending actions. It followed a rule of the Supreme Court that in construing an amended or repealing act it must be read as though Section 26 was in fact part of the section construed. This rule the Supreme Court reiterates in the opinion in *Elder v. Shoff-stall, supra* (opinion not published). It was held that there was no express language contained in the amendment which clearly indicated a legislative intent to make the amendment applicable to pending cases, the words "in all civil actions" not being sufficient.

It is not urged that the opinion of the Supreme Court in this case as expressed in the syllabus requires a reversal of the verdict in this case. The language of the 2d syllabus would by its letter seem to sustain such contention. It is as follows:

"This amended section relates to the remedy only and applies to all actions commenced in the common pleas courts of this state on and after the 14th day of May, 1913, regardless of the time when the cause of action arose."

It is respectfully submitted that the second proposition of the above syllabus was beside the actual question involved in that case, which was whether the amendment should apply to a case pending, the trial of which was commenced before the act took effect and which was submitted to the jury after the same went into effect.

To say in that case that the amendment applies to all actions commenced after May 14, 1913, regardless of the time when the cause of action arose, is to undertake to make a rule in a case not before the court, and ignores the latter part of Section 26. It is familiar doctrine that amendatory enactments in some instances may properly be applied to certain remedial rights without infringement thereof. This is because there is no vested right in such remedy.

But the right to a jury trial by unanimous verdict was a common law, constitutional right, of which neither party could be deprived without both constitutional and statutory amend-

ment. The opinion of the Supreme Court in the case cited holds it to be a constitutional right, taking jurisdiction of the case because it involved a constitutional right. The final act in changing this fundamental right did not occur until May 14, 1913.

The constitutional amendment authorizing the amendment was not self executing, but required legislation to make it effective, so that it did not become operative until the date named.

To state that the amendment relates to the *remedy*, and therefore to hold that a verdict shall be rendered in accordance with its provisions in an action commenced after May 14, 1913, regardless of when the cause of action arose, seems with due respect, to be a misconception. At the moment when default occurred on the notes in question, March 26, 1913, a remedial right came into existence in the plaintiff to commence an action in court. The right thus arising was as much a part of the *remedy* as was the right to submit it to a jury at trial. The right thus springing into existence upon default of defendant was not only a constitutional remedial right at such time, but it was carefully and explicitly guarded and preserved by existing statutory provision, viz.:

"Section 26. Whenever a statute is * * * amended, such * * * amendment shall in no manner affect pending actions, * * * civil * * * and when the amendment relates to the remedy, it shall not affect pending actions, * * * unless so expressed, * * * nor shall any * * * amendment affect causes of action, * * * existing at the time of such amendment * * * unless otherwise expressly provided in the amending * * * act."

The Supreme Court states that the amendment relates to, but does not actually hold that it applies the remedy *regardless of the time when the cause of action arose*, because the time when the cause arose was not involved in the case, *supra*. The unpublished opinion of the Supreme Court in *Elder v. Shoffstall* has been examined, wherein it is found that the same statement appears as is found in the published syllabus, prop. 2. In all

1914.]

Trust Co. v. Coal Co.

other respects the opinions therein contained and herein expressed are consistent. It is clear that the decision of the Supreme Court is not an authority on the question involved in this case, except as the opinions therein found on the questions incidental and leading up to the final one involved are in harmony. Section 26 so plainly provides that the amendment to the jury law *shall not affect causes of action existing at the time of such amendment* unless otherwise expressly provided therein, that the court is bound to conclude that though this action was commenced after May 14, 1913, the causes of action existing at and for some time prior to the amendment becoming effective, there being no language therein expressly providing otherwise, the three-fourths jury law could not be applied in this case without depriving the parties of a constitutional right.

There was then no error in the submission of the case as to the verdict.

On the burden of proof it is contended that under Section 8164 when it is shown that the title to a negotiable instrument is defective, the burden is on the holder to prove that he acquired the title in due course. Plaintiff did prove it received the same in due course. Defendant claimed otherwise and assumed the burden of so proving.

It is claimed that the court ignored the doctrine of *Breman v. Burns*, 89 O. S. It was there held that where an officer of a bank is acting for himself as an individual and as manager of a bank in the purchase of a note from himself by the bank, and this action is ratified by the bank, the manager's knowledge as a man is chargeable to the bank. That is not the question here.

The facts are altogether different here. One Thomas was formerly president of the plaintiff. At the time of negotiations of the notes he was a director, but was cashier of a bank in this city. The agreement between the makers of the notes and the payee as to future delivery of coal was made here in Columbus and communicated to Mr. Thomas. Mr. Thomas sent the notes to the bank. Some of the directors knew that Mr. Thomas sent paper to plaintiff bank. But all these matters which the defendant was allowed to go into respecting the mining property

considered with sober mind and mature reflection are far removed from the claim that these notes were given in advance for future payment so far as concerns the bank at the time the notes were discounted. The giving of the notes for future delivery of coal was an independent transaction, occurring long after Thomas was president of the bank and as such managing officer.

The court has been more than liberal to the defendants in this case by giving a new trial, and allowing wide scope in the evidence.

If any errors have occurred it has been on the side of defendant.

The charge was liberal. The question of knowledge of the consideration of the note and of the terms and conditions was submitted to the jury. But it is doubtful whether there was not error in so doing, because on careful thought it is doubtful whether there was anything in all of those matters outside of the primary consideration of the note. But the matters went to the jury and defendants had the judgment of the jury which was against them.

Even if the bank had had knowledge that the promise to deliver coal in the future, which it did not have—under *Bank v. Curtis*, 167 N. Y., 194, that would not be a defense, because as there held the consideration for the notes did not fail by reason of the non-delivery thereof, since a promise to deliver is sufficient consideration for the acceptance. And the right of a bank to enforce the liability of the notes discounted would not have been affected by its knowledge that the consideration was a promise to deliver coal in the future, because the notes were discounted for value before maturity and before a breach of the agreement to deliver. A promise to deliver is sufficient consideration for the acceptance. 167 N. Y., 194.

Under all the circumstances appearing in the evidence, without regard even to the verdict, plaintiff is entitled to judgment on the notes. Motion for a new trial is overruled, and judgment may be entered on the verdict.

1914.]

Cincinnati v. Hopkins, Treasurer.

CONTRIBUTIONS BY COUNTIES, CITIES AND OTHER TAXING DISTRICTS TO THE STATE INSURANCE FUND.

Common Pleas Court of Hamilton County.

THE CITY OF CINCINNATI, BY WALTER M. SCHOENLE, CITY SOLICITOR OF SAID CITY, v. WILLIAM A. HOPKINS, TREASURER OF HAMILTON COUNTY, OHIO, ET AL; AND THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, v. WILLIAM A. HOPKINS, TREASURER OF HAMILTON COUNTY, OHIO, ET AL.

Decided, October 15, 1914.

Constitutional Law—Construction of Section 35 of Article II—Validity of Section 16 of the Workmen's Compensation Act—Functions of the Judiciary and of the Legislature—Wisdom of Legislative Acts Not a Matter for Judicial Review.

1. Section 35, Article II, of the Constitution of Ohio, which provides, "for the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom," etc., vests in the Legislature power to fix the rate to be contributed by employers to such state fund, and the terms and conditions upon which payment shall be made therefrom.
2. Section 16 of the workmen's compensation act (Section 1465-63, General Code), providing that, "the amount of money to be contributed by the state itself, and each county, city, incorporated village, school district or other taxing district of the state shall be, unless otherwise provided by law, a sum equal to one per centum of the amount of money expended by the state and for each county, city, incorporated village, school district or other taxing district respectively during the next preceding fiscal year for the service of persons described in subdivision one of section fourteen hereof" is a valid exercise of the power conferred upon the Legislature under Section 35, Article II, and is not in conflict with Section 5, Article XII, of the Constitution of Ohio.

Walter M. Schoenle, City Solicitor, *Charles A. Groom*, Assistant City Solicitor, and *W. T. Porter*, for plaintiffs.

T. S. Hogan, Attorney-General, *James I. Boulger*, *John A. Deasy* and *Thos. H. Morrow*, contra.

CUSHING, J.

The question presented for determination in the above entitled causes is the constitutionality of Section 1465-63, General Code (Section 16 of the Workmen's Compensation Act):

"The amount of money to be contributed by the state itself, and by each county, city, incorporated village, school district or other taxing district of the state shall be, unless otherwise provided by law, a sum equal to one per centum of the amount of money expended by the state and for each county, city, incorporated village, school district or other taxing district, respectively during the next preceding fiscal year for the service of persons described in subdivision one of section fourteen hereof."

The sections of the Constitution of Ohio, in question are Section 5 of Article XII:

"No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied."

And Section 35 of Article II of the Constitution, which reads as follows:

"For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution, thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom, and taking away any or all rights of action or defenses from employes and employers; but no right of action shall be taken away from any employe when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employes. Laws may be passed establishing a board which may be empowered to classify all occupations, ac-

1914.]

Cincinnati v. Hopkins, Treasurer.

ording to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto."

It is claimed by plaintiffs in the above causes that the sections of the act in question are unconstitutional on two grounds:

1st. That no tax shall be levied unless the law imposing the tax states distinctly the object of the same to which it only shall be applied, and that the act in question does not so provide; that the fund raised from taxation, together with the fund raised from contributions by persons or corporations employing more than five persons goes into a common fund and is applied to the payment of all claims under the act; and

2d. That the Legislature has fixed an arbitrary rate of one per cent. of the amount received by employees of the state and subdivisions thereof, instead of classifying such employees, as is required by the Constitution in cases of private employment.

Counsel for plaintiffs contend that if the state, acting through its Legislature, can fix a rate of one per cent. of the amount of salaries paid to its employees, that it can fix ten or twenty-five or fifty per cent.; that there is no separation of the fund under the law and that money raised from taxes would thus be diverted to purposes not specified in the bill; also, that the cost of conducting the department, amounting to several hundred thousand dollars a year, is paid out of taxes and not made a part of the expense conducting the liability awards, and is not a proper expenditure of taxes; also, that taxes levied in Hamilton county could and would be used to pay beneficiaries in counties other than that for which the taxes were levied; that the provisions of the Constitution above quoted are limitations upon the powers of the Legislature rather than a grant of power.

Many times within the last decade courts have been called upon to consider the constitutionality of acts of the General Assembly, where it seems to me it is a review of the wisdom of the acts rather than a judicial determination of whether it is within the power of the Legislature to pass such acts. Appeals

to courts seems to have been an easy method of reviewing acts of the Legislature; whether properly I do not say. The judiciary and the Legislature have separate governmental functions to perform and each should exercise the greatest care not to go outside of its own functions.

To ascertain whether a state rightfully exercises a power it is only necessary to see whether by the Constitution that power is conceded to the National Government, or by that Constitution or the Constitution of the state, the power is prohibited to be exercised by the state.

The judicial function is to interpret the law and see that it does not violate any of the provisions prohibited by the Constitution. Courts will not undertake a correction of legislative acts or mistakes. The Legislature is directly answerable to the people for their acts, and it is the duty of the people to keep in close touch with the courts, with the Legislature, and the executive, to see that each performs its function within its own sphere.

It has been well said in speaking of the frequency with which courts have been called upon to review and correct legislative acts:

“The tendency of a common and easy resort to this court function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.”

I quote again:

“The judiciary today, in dealing with the acts of its co-ordinate legislators, owes to the country no greater or clearer duty than that of keeping their hands off these acts whenever it is possible so to do.”

The question then is, is the act in question within the power of the Legislature, and not as was contended in argument that the rate fixed was one per cent. or twenty-five per cent. If the Legislature has the power it can fix the rate at any amount it sees fit, and as the people must pay it, it is for them to select such legislators as will express their will, and not for the courts to exercise a supervision over legislative acts.

1914.]

Cincinnati v. Hopkins, Treasurer.

If I correctly state the fundamental principles of government, that all power is vested in the state through its Legislature, except such as are prohibited by the Constitution itself or delegated to the Government of the United States, then it seems to me that the only question in this case is: Has the Constitution prohibited the state from enacting the law in question?

In the case of *State, ex rel Watson, v. Edmondson, Auditor of Hamilton County*, Judge Johnson of the Supreme Court, in passing on the blind act, held the act unconstitutional on the ground that it was taxing money levied for taxes in Hamilton county, placing it in the state fund, and distributing it to other counties where it was needed for the support of the blind. In that case, as I understand it, the money had been levied by taxes and was in the treasury of Hamilton county for specific purposes.

Judge Johnson had this to say:

"But there is another material infirmity in the law of 1913. Section 8 of this act requires that on the demand of the state treasurer the treasurers of the respective counties shall transfer and pay over to the state treasurer all moneys in their possession or that may thereafter come into their possession under present levies for the relief of the blind. It is conceded in the cases at bar that the county treasurer has in his possession moneys raised under the act of 1908 which were raised by taxation specifically for the relief of the blind in accordance with the provisions of that law.

"In the consideration of this provision we are confronted with the plain mandate in Section 5 of Article XII of the Constitution that 'No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied.' The taxes in the county treasuries, which were paid under the levies provided for in the act of 1908, can manifestly be applied only to the objects distinctly stated in the law providing for their levy. The portion of Section 8 of the law of 1913, above referred to, is in direct conflict with Section 5 of Article XII. Each county of the state has raised a fund of its own under the law of 1908 to be applied for the relief of its own blind. Necessarily the amount and the proportionate amount which each county would raise would be different from each of the other counties, and different from its proportion if originally raised by the state for state pur-

poses. To require that this money should be turned over to the state treasurer and used as a part of a fund which belonged to the entire state to be expended for the purposes of the entire state, although the object would be similar, would produce the very inequality and injustice which the Constitution intended to prevent."

The distinction between that case and the case at bar is that the money was already levied in the one case, whereas, in the case at bar, the question is the power of the Legislature to impose a tax that shall be levied.

Counsel for plaintiffs contend that the constitutional provision above quoted is a limitation on the Legislature. I can not agree with this contention. The only limitation found in Section 15 of Article XII is the regulation with reference to private or corporate employment. In these respects the Legislature followed the provisions of the Constitution. But as the Constitution does not mention employees of the state, it seems to me that there is no prohibition in the Constitution with reference to such employment.

The act itself states that the money thus raised from taxes is to go into a general fund and to be used to pay persons coming within the provisions of the Workmen's Compensation Act. The question is one for the people and their Legislature. It is not within the province of a court to review and pass upon the wisdom of legislative acts. The conclusion is that the act in question is constitutional and the demurrers to the petitions must be sustained.

1914.]

Albrecht v. Hoffman.

ADMINISTRATION OF AN ESTATE IN DIFFERENT JURISDICTIONS.

Common Pleas Court of Hamilton County.

MARIE ALBRECHT v. CHARLES W. HOFFMAN.

Decided, May 28, 1913.

Executors and Administrators—Judgment Obtained Against Estate in Another Jurisdiction—Effort to Enforce Against Ancillary Administrator.

A judgment recovered against a domiciliary administrator in Alabama can not be made the basis of a right of action by the judgment creditor against the ancillary administrator of the same estate in Ohio.

Gideon C. Wilson, for plaintiff.

Robert P. Hargitt, contra.

MAY, J.

Demurrer to petition.

The plaintiff in her petition alleges that the defendant is the duly appointed ancillary administrator of the estate of John B. Campbell, deceased, and that he was appointed as such administrator by the Probate Court of Hamilton County, on May 1, 1909, and that he has in his possession assets of such estate. The plaintiff further alleges that she recovered a judgment against Nelson L. Seeley, administrator of the decedent, John B. Campbell, on March 12, 1909, in the law and equity court of Mobile, Alabama, the amount of said judgment being \$996; that no part of said judgment has been paid and that it is in full force and effect and that Nelson L. Seeley, as said administrator, has no assets in his possession for the payment of said judgment. Plaintiff further alleges that she filed with Charles W. Hoffman, ancillary administrator of the estate of J. B. Campbell, her claim of \$996 and interest "in the nature of an authenticated copy of the judgment record of the law and equity court of

Mobile, Alabama," and that Charles W. Hoffman, as such ancillary administrator, did, on February 5, 1913, reject the claim. Wherefore, plaintiff prays for a judgment and order finding that her claim is a valid and subsisting claim against the estate of John B. Campbell, deceased, and ordering and directing the defendant, Charles W. Hoffman, ancillary administrator of said estate, to allow and pay said claim, or so much thereof as the assets of the estate applicable thereto will pay, and for all legal and equitable relief she may be entitled to.

The defendant filed his demurrer on three grounds:

1. That the court has no jurisdiction of the subject of the action.
2. That the plaintiff has no legal capacity to sue.
3. That the petition does not state facts which show a cause of action.

Inasmuch as I am of the opinion that the petition does not state facts which show a cause of action, it is unnecessary for me to consider the first two grounds of the demurrer.

There are no Ohio cases bearing directly on this question.

Judge Ranney has a very strong dictum against allowing such an action, in the case of *Swearingen v. Morris*, 14 Ohio St., 424.

The Supreme Court, in *Williams v. Welton*, 28 Ohio St., 451. held that Welton's administrator could maintain an action against the estate of Williams in Ohio to recover a judgment for money only on a contract made by the intestate in Maryland. This case, however, is easily distinguishable from the case at bar because the subject-matter of the action was the original contract, whereas, in the case at bar the subject-matter of the action is a judgment not recovered against the intestate, but recovered against a domiciliary administrator of the estate.

The authorities are uniform in holding that:

"Where administrations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for in contemplation of law there is no privity between him and the other adminis-

trator." *Story, Conf. Laws*, Section 522; 1 *Rockel, Prob. Pr.*, Section 185; 1 *Woerner, Administration*, Section 162.

The leading case on the subject is the case of *Stacy v. Thrasher*, 47 U. S. (6 How.), 44, where the Supreme Court held that an action of debt will not lie against an administrator in one of these United States on a judgment obtained against a different administrator of the same intestate appointed under the authority of another state. The court also held that there was no privity of estate between the two administrators. See also an instructive case—*Braithwaite v. Harvey*, 14 Mont., 208. To this case is appended an exhaustive note in which all the authorities on the subject are collected.

This doctrine has been upheld frequently by the Supreme Court of the United States. In the case of *Johnson v. Powers*, 139 U. S., 156, the court, speaking through Mr. Justice Gray, held that a judgment recovered against an administrator in one state is no evidence of debt in a suit by the same plaintiff in another state against third persons having assets of the deceased. In this case Mr. Justice Brown dissented, but at page 164 he says:

"It is true that these proceedings are not binding upon others than parties and privies, and if this were an action against the administrator of the same estate in the state of New York it is conceded at once that under the case of *Stacy v. Thrasher*, *supra*, the action would not lie."

The latest case on the subject is that of *Brown v. Fletcher*, 146 Mich., 401. At page 424 the court says:

"The Massachusetts administrator and the Michigan executors are not in privity, and, considered apart from the effect to be given to the stipulation of the parties, the decree of the Massachusetts court has no force or effect to bind anyone except the administrator appointed in that jurisdiction."

This case was taken to the United States Supreme Court and was affirmed in *Brown v. Fletcher*, 210 U. S., 82 (28 Sup. Ct. Rep., 702; 52 L. Ed., 966), the court holding that there is no privity between the executor and administrator with the will

annexed appointed in another state which makes a decree in a court of such state binding against the latter under the full faith and credit clause of the Federal Constitution upon the former in the courts of the state in which such executor is appointed. On page 90, Mr. Justice Brewer speaking for the court says:

“Considering first the latter proposition (relation of privity), we are of opinion that there is no such relation between the executor and an administrator with the will annexed, appointed in another state as will make a decree against the latter binding upon the former, or the estate in his possession. While a judgment against a party may be conclusive, not merely against him, but also against those in privity with him, there is no privity between two administrators appointed in different states. *Vaughan v. Northrup*, 40 U. S., (15 Pet.), 1 (10 L. Ed., 639); *Aspden v. Nixon*, 45 U. S. (4 How.), 467 (11 L. Ed., 1059); *Stacy v. Thrasher*, 47 U. S. (6 How.), 44 (12 L. Ed., 337).”

In this latter case the court also reviews many of the leading authorities on this question.

If this action were based upon a claim against the intestate of the defendant, as stated above, it might be maintainable in this state upon the authority of *Williams v. Welton*, *supra*, but, the plaintiff in this case relies solely upon the judgment recovered against the domiciliary administrator in Alabama, and according to the unbroken chain of authorities such a judgment can not form the basis of a suit, and, therefore, when the defendant, as ancillary administrator, rejected the claim, no suit can be maintained to have the claim declared a valid and subsisting claim against the estate of John B. Campbell, deceased, and ordering and directing the ancillary administrator in this state to allow and pay such claim.

'914.]

State, ex rel, v. Prestien.

**TITLE TO FEES PAID INTO THE TREASURY BY A COUNTY
OFFICER SERVING UNDER AN UNCONSTITUTIONAL SALARY LAW.**

Common Pleas Court of Cuyahoga County.

STATE OF OHIO, EX REL MARCELLUS A. LANDER, v. CHARLES T.
PRESTIEN ET AL.

Decided, July 3, 1914.

Office and Officer—Change in Judicial Opinion—Effect of, on Compensation of Public Officials—Waiver and Acquiescence—Mandamus Not Applicable to a Disputed Claim Which Has Never Been Allowed.

1. Refusal to permit one to assert rights founded on a change in judicial opinion relating to the constitutionality of a legislative act, has been extended and held to apply to other cases than cases involving the obligation of contracts.
2. A county officer who served under an unconstitutional salary law, and who was paid the salary therein provided, subordinates being paid out of the county treasury and all fees earned and collected paid into the county treasury to the credit of the fee fund, can not be permitted almost ten years after his retirement from office to assert the invalidity of the salary act as the basis for recovery of fees so turned over and thereby place the county in a less favorable position than if the act had not been passed.
3. In such a case the doctrine of waiver and acquiescence must be held to apply, in that the said official waived all title to the fees paid by him into the treasury in excess of his salary and to have acquiesced in the receipt of these fees by the county and to their becoming blended with other funds of the county.
4. Moreover, were it possible to maintain such a claim, it would necessarily be by an action at law and not by mandamus.

Griswold, White & Hadden, for plaintiff.

Cyrus Locher, Prosecuting Attorney, contra.

ESTEP, J.

This branch of the court sustained a demurrer filed to the original petition in this action. The plaintiff filed an amended

petition. The defendant answered, and the case was tried to the court upon its merits.

It appears that prior to the year 1896 the fee system as applied to the county offices, had become such a source of profit to those holding the various county offices, particularly in the larger counties, that it became a matter of public discussion and resulted in legislative action upon the subject. In Cuyahoga county several of the offices produced enormous returns by way of fees, and thus made the compensation attached to the various offices out of all proportion to the services rendered. Accordingly salary laws were passed applicable to various counties. Among those passed, one applied to Miami county (92 O. L., 567), one to Pickaway county (92 O. L., 597), and one to Cuyahoga county (92 O. L., 602). The object of these laws, and particularly the one applicable to Cuyahoga county, was to place these offices on a salary basis, and provided for a collection of the fees by the various officers to be paid by them into the county treasury of the county as public moneys belonging to it. The officers thus being deprived of the fees, the fees which previously belonged to them, were provided by the law with salaries commensurate with the services rendered, and the purpose and clear intent of the law was to limit the sources of revenue to be derived by these officials to the salaries therein provided.

On the 9th day of March, 1897, the Supreme Court in the case of *Pearson v. Stephens*, 56 O. S., 126, held the law applicable to Miami county constitutional. On the 24th day of June, 1902, the same court in the case of *State, ex rel Guilbert, v. Yates*, 66 O. S., 546, held the Pickaway county act unconstitutional. On the 26th day of January, 1903, the Circuit Court of Cuyahoga county, in the case of *State, ex rel Nunn, v. Wright*, held the Cuyahoga county law unconstitutional. The plaintiff in this action, Marcellus A. Lander, was, on the 2d day of November, 1897, elected treasurer of Cuyahoga county, taking his office September 5, 1898, and served for two successive terms, until September 1, 1902.

1914.]

State, ex rel, v. Prestlen.

All the fees earned by him during his two terms of office were collected by him and paid into the treasury of the county, and credited to the fee fund created by the salary law; and his salary and the salaries of his office force were paid out of the county treasury. The total amount of fees paid by the said Lander into the treasury and credited to the fee fund was \$182,135.97. The amount paid from the treasury to the said Lander and his deputies was \$120,915.33, making an excess of the amount paid into the county treasury over the amount paid out in the sum of \$61,220.64.

The plaintiff now seeks, by this action of mandamus, to be allowed this excess sum with interest from the time of the commencement of this action.

The plaintiff during his two terms of office treated this act as a constitutional act, even though on the 24th day of June, 1902, the Pickaway act was declared unconstitutional. The day after the Cuyahoga county law was declared unconstitutional, to-wit, January 27, 1903, there was an approximate balance to the credit of the fee fund of \$83,906.16. On February 21, 1903, the sum of \$30,000, by order of the commissioners, was transferred from the fee fund to the general fund of the county, and the balance remaining in said fund after this transfer, was used to defray the expenses of the insolvency court. The fund was largely a matter of bookkeeping. The money credited to this fund was mingled with the other moneys of the county, and was used to pay the general expenses of the county.

This was particularly so after the transfer of February 21, 1903. I have some doubt as to whether or not any action on the part of the commissioners was necessary to transfer the funds from the fee fund to the general fund. The act having been declared unconstitutional, and thus ceasing to have any legal effect, it failed in its entirety and the fee fund went out of existence with the remainder of the act. The moneys were already commingled with the other moneys of the county, and there it remained for use by the county in meeting the payment of its general expenses. The testimony discloses no ob-

jection on the part of Lander to the use of this money by the county in defraying its general expenses. The testimony does not show that he had any actual knowledge of the transfer; but it shows how little concerned he was in looking after this large sum of money to which he now lays claim. The testimony further discloses that plaintiff did not employ counsel in regard to his claim until the year 1909, and made no demand upon the county until the year 1911, and did not commence this action until February 3, 1912, almost ten years after he ceased to be treasurer of the county.

Should the plaintiff, upon this state of facts, now be permitted as a basis for recovery in this action, to assert the unconstitutionality of the salary act? Has his conduct in relation to this act been such that, to now permit the assertion of its invalidity would place the county in a less favorable position than if the act had not been passed?

In regard to the claim of counsel for defendant with reference to the effect to be given to a change in judicial opinion relating to the constitutional validity of legislative enactments, I agree with them in their claim that such change is not confined merely to the cases which hold that retrospective operation should not be given to a change in judicial opinion only when it would impair the obligation of contracts.

The doctrine that it is confined to the impairment of the obligations of contracts is laid down in the case of *Lewis v. Symmes*, 61 O. S., 471. The doctrine has been modified and extended, as appears from an examination of the following cases: *Cincinnati v. Taft*, 63 O. S., 141; *Cincinnati v. Trustees, etc.*, 66 O. S., 440; *Shoemaker v. Cincinnati*, 68 O. S., 603; *State v. Lewis*, 69 O. S., 202-206; *Thomas v. State*, 76 O. S., 341.

I am of the opinion that the refusal to permit one to assert rights *founded upon a change in judicial opinion* relating to the unconstitutionality of a legislative act has been extended and held to apply to other cases than to cases involving the impairment of the obligation of contracts. I am further of the opinion that the plaintiff has so dealt with this act, and his conduct

1914.]

State, ex rel, v. Prestien.

during his terms of office, and for nearly ten years thereafter, was such that he should not now be permitted to assert this change in judicial opinion, for the reason that to permit him to do so would be placing the county in a less favorable position. It would be depriving the county of funds which the Supreme Court had held belonged to the county. The plaintiff had turned these fees over to the county, permitted it to mingle them with the other funds of the county, and remained silent for nearly nine years after his term of office had expired. These fees have long since been expended in the payment of obligations of the county; and to now allow this claim on the ground that this particular act was declared unconstitutional on the 23d day of January, 1903, after plaintiff's terms had expired, would not only be depriving the county of funds which when paid into the county treasury were legally paid there; but there being no funds now to meet this claim, it would place the county to the disadvantage of securing this sum from some source, even if necessary to resort to the method of raising it by taxation.

If I am wrong in this claim, I am of the opinion that the doctrine laid down in the Vail case, 84 O. S., 399, is applicable. H. L. Vail, who was clerk of the courts of Cuyahoga county, and operated his office a portion of the time under the salary act, sought in this action to *retain* fees which *accrued before but were not paid* until *after* said act had been declared unconstitutional. He was not attempting to secure from the county fees which had been paid by him into the county treasury under this act, but was simply trying to retain fees which came into his possession after the act had been declared invalid. He was permitted to retain these fees, and this case was undoubtedly rightly determined. If the plaintiff in this action, in view of the decision of the Stephens case, and upon a consideration of his entire conduct during his terms of office and thereafter in relation to these fees, can now claim the excess fees by reason of the unconstitutionality of this act, he can also recover all the fees collected by him and paid by him into the treasury. The county could also reclaim from him and his deputies the money.

paid to him and his deputies by way of salaries and compensation. The mere statement of this claim shows to what conclusions the logic of plaintiff's present claim would lead.

The doctrine laid down in the Vail case to the effect that a party can not assert that an act of the General Assembly is unconstitutional when his conduct has been such that to permit the assertion would place his adversary in a less favorable position than he would have occupied if the act had not been passed, is, in my opinion, applicable to the case at bar. While there is language in this opinion used by Shauck, J., which is *obiter*, and which may be used in furthering the claims of each side of this controversy, yet I am constrained to believe that Judge Shauck, in a case like the one at bar, undertook to make the doctrines of waiver and acquiescence applicable. As I have already stated, Vail was not attempting to get from the county anything he had paid to it. In Vail's attempt to retain funds paid to him after said act had been declared unconstitutional, Shauck, J., said that the doctrine of waiver and acquiescence did not apply. He said:

"What he waived was his right to the costs above salary during his second incumbency and until the salary act was declared unconstitutional, and his acquiescence was in the receipt of such surplus fees during the same time by the county. The fees to which he thus waived his right thereby became blended with the funds of the county, but as to those fees which are the subject of the controversy, the county occupies precisely the same position it would have occupied if the unconstitutional act had not been passed or the defendant had challenged it immediately upon its passage."

Plaintiff's counsel in their brief claim that the language of Judge Shauck, in reference to waiver and acquiescence, relates to the sum of \$50,000 which was taken from the fee fund and turned over to the general fund of the county. I have carefully read the record in the Vail case and also the briefs of counsel, and I am unable to find anything which will support this contention. Judge Shauck states the law to be, what I have under-

1914.]

State, ex rel, v. Prestlen.

taken to make appear in this opinion, that Lander waived the fees paid into the treasury in excess of his salary, and acquiesced in the receipt of these fees by the county and in permitting them to be blended with the other funds of the county.

I am, therefore, of the opinion that the plaintiff, by treating this act, during his two terms as treasurer, as a constitutional act, as he was clearly justified in doing by reason of the holding of the Supreme Court in the Stephens case; by his payment of all the fees collected by him over to the county thereby investing it with title to these funds; by his receipt of his salary provided by the act during his two terms of office and requesting that his deputies and other assistants be paid out of the county treasury; by his retirement from office without making any demand for these excess fees; by his acquiescence in the disbursement of the balance of the fee fund to defray the general expenses of the county; by his standing by for nearly nine years after his terms of office had expired before making any demand for the excess fees, prevents him from now asserting the change in judicial opinion relating to the constitutionality of this act so as to make the change retroactive; that he has so dealt with said act that he can not now be permitted to assert its invalidity as a basis for recovery, and also that the plaintiff has waived his right to recover those excess fees, and has acquiesced in the receipt of them by the county.

2. Having held that plaintiff is not entitled to recover on the grounds above set out, it is probably unnecessary for me to consider any of the other matters so ably discussed in the briefs submitted.

I desire, however, after carefully considering the able brief filed by counsel for plaintiff, to again say that in my opinion the plaintiff can not resort to an action in mandamus to recover these excess fees from the county.

I agree with the doctrine of the cases which hold that, where it is only a question of *the method of payment*, and where an officer refuses to draw a warrant when it is *clearly his legal duty to do so*, the remedy in mandamus is applicable, is in fact the

proper remedy. It is also the remedy where the claim can only be paid out of a certain fund (27 O. S., 96). It is clear under the proof in the case at bar that the fee fund has gone out of existence and that the funds were long since paid out in defraying the general expenses of the county. If plaintiff's claim were allowed, it would have to be paid in the same manner other claims against the county are paid.

Plaintiff's counsel, at page 13 of their brief, following the reasoning of the case in 27 O. S., 96, say:

"The money which Mr. Lander is entitled to is not money out of the general fund of the county which has been raised by the ordinary methods of taxation; the money which Mr. Lander is entitled to is his own money raised by the collection of fees as authorized by the statutes in Ohio. He is not entitled to county money generally; he is only entitled to this fee money. If he were to sue the county direct, and recover a judgment, it would need to be paid out of these fees."

In the light of the proof in the case, I think I am correct in stating that this position was entirely abandoned by the plaintiff. The proof disclosed that *these fees* had been expended by the county years before this action was commenced, and the fund itself, if it had not gone out of existence when the law was held invalid, had ceased to exist as a matter of bookkeeping. There is no longer any so-called fee fund.

I take it, therefore, that if the county owes plaintiff the sum he seeks to recover, it must be paid out of the general funds of the county; or if there is not enough money in the general fund, it would have to be met in some other way by the county.

The plaintiff simply asserts a claim for money, against the county, arising out of his occupancy of the position of treasurer of the county; and while the amount of the claim is undisputed, the county, by its proper officials, denies all legal liability. In other words, the plaintiff claims that the county owes him the sum of \$61,220.64, being the excess fees paid by him to the county during his terms as treasurer of the county under the salary law. The county admits that the amount of the excess

1914.]

State, ex rel, v. Prestlen.

fees is correct, but denies that it owes him any sum whatsoever. It denies all legal liability.

If this claim can be enforced by proceedings in mandamus, then it is clear that any claim for money had and received against the county can be enforced by this remedy, and actions at law against the county upon money demands will be entirely superseded. If this claim of plaintiff had been allowed by the proper authority, the payment of it would be clearly a ministerial duty, and mandamus would be the proper remedy.

The claim of plaintiff, however, has never been allowed by the proper officials. On the contrary, it has always been a disputed claim, and is one which, in my judgment, can only be enforced by an action at law. Section 2460 of the Code provides how claims against the county are allowed and paid. This, as I have held, is a claim for money against the county. This claim does not come within any of the provisions of this section. This statute also provides that no public money shall be disbursed by the county commissioners, or any of them, but shall be disbursed by the county treasurer, upon the warrant of the county auditor, specifying the name of the party entitled thereto, on what account, *and upon whose* allowance, if not fixed by law.

In conclusion I will say that I have been unable to distinguish plaintiff's claim from any ordinary claim for money which might be asserted against the county. It is a disputed claim. It has never been allowed by the county commissioners nor by any other officials. It is not a claim fixed by law, and has never been allowed by any person or tribunal. This being true, the plaintiff should be required to pursue his remedy at law, provided he has any such remedy.

Entertaining these views, I find in favor of the defendants, and dismiss plaintiff's petition.

BILLS OF EXCEPTIONS FROM THE MUNICIPAL COURT.

Common Pleas Court of Hamilton County.

H. W. SCHNEIDER & SON V. CHARLES MACINTOSH.

Decided, September 1, 1914.

Error to the Common Pleas—Failure of Clerk to Give Notice of Filing of Bill of Exceptions—Not Ground for Striking the Bill From the Files, When—Proper Practice in Error Proceedings From the Municipal Court.

1. The common pleas court will not hold a plaintiff in error accountable for the failure of the clerk of the municipal court to give notice to the defendant in error of the filing of a bill of exceptions, and a motion to strike the bill from the files on account of such failure will be overruled.
2. Practice in the municipal court with reference to the filing of bills of exceptions and the giving of notice thereof should be made to conform as nearly as practicable with that of the common pleas court.

David Lorbach, for the motion.

Arthur Wood, contra.

GORMAN, J.

Opinion on motion to strike bill of exceptions from the files.

This is a proceeding in error to reverse a judgment of Judge W. M. Yeatman, one of the judges of the municipal court of the city of Cincinnati.

In the trial of the cause below judgment was rendered in favor of the defendant, Charles Macintosh, for costs. A petition in error was filed in this court on July 23, 1914, to reverse the judgment of Judge Yeatman. There was also filed in this court on the day of the filing of the petition, July 23, 1914, a paper purporting to be a bill of exceptions and attached thereto a certified copy of what purports to be the docket and journal

1914.]

Schneider v. Macintosh.

entries in the municipal court of Cincinnati, and attached to the bill of exceptions appear to be exhibits consisting of bill of particulars filed below, the answer thereto, the summons issued thereon, subpoenas for witnesses, and the various entries and papers filed in the court below.

The defendant has now filed a motion to strike this paper purporting to be a bill of exceptions from the files on the ground that no notice, as required by law, was given to Charles Macintosh or his attorney of the filing of the bill of exceptions with the clerk of the municipal court of Cincinnati.

There appears endorsed on the bill of exceptions the following: "July 3-14, Received of Aug. Kirbert, Clerk, Bill of Exceptions. W. Meredith Yeatman." The bill of exceptions also appears to be signed by W. Meredith Yeatman, judge of the municipal court of the city of Cincinnati, but no date is given of the signing of the bill of exceptions. The certified copy of the transcript of the docket and journal entries contains these notations with reference to the bill of exceptions:

"1914, May 14. Yeatman, Judge. Min. 352: Entry overruling motion for a new trial. Plaintiff excepts.

"June 23. Bill of particulars filed.

"June 23. Adverse party notified.

"July 3. Bill of exceptions transmitted to Judge Yeatman.

"July 8. Bill of exceptions signed and returned to clerk."

There is nothing on the bill of exceptions to show when it was returned to the clerk or received by him from the trial judge, nor is there anything on the bill of exceptions to indicate when the bill of exceptions was signed by Judge Yeatman. There is nothing on the record to show how the notice was served on the adverse party or when it was served, except the bare statement in the transcript of the docket and journal entries, "adverse party notified."

By the provisions of Section 26 of the act to amend an act providing for enlarging and extending the jurisdiction of the police court of Cincinnati and changing the name of said court

to a municipal court, found in 104 Ohio Laws, 188, it is provided that:

“Proceedings in error may be taken to the court of common pleas of Hamilton county, from a final judgment or order of the municipal court of Cincinnati in the same manner and under the same conditions as provided by law for proceedings in error from the court of common pleas to the court of appeals, of Hamilton county.”

It will therefore be seen that in order to determine whether or not the bill of exceptions in this case should be allowed to stand we must look to the provisions governing the taking and filing of a bill of exceptions in the court of common pleas.

Now, Section 11565 of the General Code provides, among other things, that on the filing of a bill of exceptions, the clerk forthwith shall notify the adverse party, or his attorney, of its filing.

No method of giving notice is provided, and there appears to be no copy of a notice among the papers, as there usually is in such cases when a bill of exceptions is filed in the court of common pleas to prosecute error to the court of appeals, but there is noted on the transcript of the docket that the adverse party was notified on June 23d.

In the case of *Kroll v. Close, Admr.*, 82 Ohio St., 190, the Supreme Court, through Judge Davis, in announcing the opinion of the court, used this language:

“It is objected that the circuit court erred in refusing to strike off the bill of exceptions taken in the court of common pleas by the plaintiff in error, for the reason that the defendant in error did not have the ten days provided by Section 5301, Re-Statutes (11565, G. C.), in which to file his objections and amendments to the bill of exceptions. The presumption is that notice was given to counsel, and that they had an opportunity to inspect and object to the bill, although the record is silent as to that fact. It does not appear that counsel did not waive the right to object to the bill within ten days after notice

1914.]

Schneider v. Macintosh.

that it had been filed with the clerk. *State v. Wirick*, 81 Ohio St., 343."

Now, in this case, the fact that the docket and journal entries show that notice was given the adverse party appears to the court sufficient to indicate that the notice was given in the absence of any specific provision as to how notice shall be given. It is true counsel for defendant has filed an affidavit setting out, among other things, that no notice was served upon him personally or by mail of the filing of the bill of exceptions, and no notice set out in the *Court Index*.

While the court is of the opinion that good practice requires a written notice to be served upon the adverse party, or his counsel, nevertheless, in the absence of a specific provision of the statute requiring that to be done, the court is not disposed to hold that such a notice is essential.

The decision just cited holds that there is a presumption that the notice was given to counsel. Now, whether or not this is an irrebuttable presumption the court is not prepared to say. Taking the record of the clerk in the municipal court and the affidavit of counsel for defendant denying that notice was given, and no countervailing evidence that notice was served, the court must determine whether or not the affidavit of counsel for defendant shall prevail over the notation on the docket of the municipal court that adverse party was notified.

The statute provides that the adverse party shall have ten days after notice within which to make objections or ask for amendments to be made to the bill for its correction. If counsel for defendant or his client were not notified, then manifestly no opportunity would be given within ten days to make objections to the bill of exceptions, and the record does not show any objections to have been made to the bill of exceptions.

Section 11566, General Code, provides that the trial judge shall, upon the receipt of the bill, endorse thereon the date it was received, and within five days thereafter correct it, if necessary, allow and sign such bill, and immediately transmit or

cause it to be transmitted to the office of the clerk from whom it was received, with any amendment or objections thereto.

The bill of exceptions upon its face has the endorsement of the judge that he received it on the 3d of July, 1914, which is ten days after the date upon which it purports to have been filed, June 23d, as shown by the transcript of the docket in the municipal court of Cincinnati. It was the duty of the court then to sign this bill of exceptions not later than the 8th day of July, unless the time was extended, and to transmit same to the clerk of the municipal court.

As before stated, there is nothing in the bill of exceptions to indicate when it was signed by the trial judge, nor is there anything in or about the bill of exceptions to show when it was transmitted to the clerk by the trial judge, nor is there anything upon the bill of exceptions to show when it was filed with the clerk of the municipal court.

Section 11570 of the General Code provides that the clerk of the court in which the cause is pending shall enter upon its appearance docket the date of the filing of any bill of exceptions therein.

This has been done apparently, but instead of saying "bill of exceptions" the clerk has said "bill of particulars filed June 23." This, we think, is an error of the clerk, which may be corrected under Section 11572a of the General Code, found in 103 Ohio Laws, page 426, which provides that when justice requires it, upon notice to all parties, an omission in a bill of exceptions, occurring through accident or error, may be corrected by the reviewing court, or it may be remanded to the trial court for such correction.

Section 11570, General Code, further provides that the clerk shall note upon the appearance docket not only the date of the filing of the bill of exceptions, but also the date of the filing of any objections or proposed amendments thereto, and the date of the transmission thereof to the judge or judges, and of the receipt of them from the judge or judges.

1914.]

Schnelder v. Macintosh.

Now there does appear to have been entered upon the appearance docket in the municipal court, under date of July 3d, that the bill of exceptions was transmitted to Judge Yeatman, and also the date of the filing of the bill of exceptions, but by error called "bill of particulars." There is also a notation on the appearance docket of the date of the signing of the bill of exceptions by the trial judge, July 8th.

By the provisions of Section 11571, General Code, it is provided that no entry need be made upon the journal of the court of the settling, allowing and signing of a bill of exceptions, but that the signature of the trial judge in allowing, settling and signing it shall be sufficient evidence of such fact.

While the court has very grave doubt as to whether or not any notice was ever served upon the adverse party or his counsel of the filing of this bill of exceptions, in view of the affidavit of counsel for defendant, nevertheless, in view of the state of the law with reference to the manner of giving notice and the kind of notice to be given, and the notation upon the appearance docket of the giving of the notice to the adverse party, the court is loath to find that no notice was given, but is disposed to follow the ruling of Judge Davis in the case above cited, *Kroll v. Close*, that there is a presumption that notice was given to counsel.

In this case, if the bill of exceptions should be stricken from the files a grave injustice might be done the plaintiff in error through no fault of his, but by reason of a neglect or oversight on the part of the clerk, whose duty it would be to notify the adverse party, and not the duty of the party. Under such circumstances, the court is not disposed to hold the plaintiff in error accountable for failure to give notice. The bill of exceptions appears to have been signed and a notation of the time of the signing and returning thereof placed upon the appearance docket.

There is no statement in the bill of exceptions that this was all of the evidence adduced upon the trial of the case, and in

view of the omission of such a statement in the bill of exceptions the court of common pleas could not reverse this judgment upon the weight of the evidence, but could only reverse the judgment in case there were other errors of law.

The court is of the opinion that it would conduce more to substantial justice to overrule this motion to strike the bill of exceptions from the files and let the court of common pleas pass upon the merits of the case.

The opinion of the court is that the method of giving notice employed in the court of common pleas of the filing of bills of exceptions therein and service of the same by the sheriff should be practiced as nearly as can be by the officers of the municipal court; otherwise doubts will arise in every case as to the time of filing the bill of exceptions, the giving of notice, signing of the bill by the court, and the return thereof to the clerk.

Motion is therefore overruled.

1914.]

Cincinnati v. Light Co.

**TITLE TO AND CONTROL OVER STREETS BY
MUNICIPALITIES.**

Common Pleas Court of Hamilton County.

THE CITY OF CINCINNATI, BY WALTER M. SCHOENLE, ITS CITY
SOLICITOR, v. THE DIAMOND LIGHT COMPANY.

Decided, November 11, 1914.

*Electric Light Companies—Consent of Municipal Authorities to the
Use of Streets and Alleys—Must be Exercised in a Reasonable and
Not an Arbitrary Manner—Exclusive Rights and Monopoly in the
Lighting Business Not Favored—Mandamus by a Company Denied
Use of the Streets Lies, When.*

While express consent should be secured by an electric light company from the proper municipal authorities before undertaking to lay conduits or string wires in any of the public ways of a municipality, yet if council should unreasonably refuse to grant such permission to a company having permission so to do from the abutting land owners, mandamus or mandatory injunction will lie to require the granting of such consent, to a company duly authorized under the laws of the state, to lay such conduits under reasonable restrictions or in accordance with the provisions of an existing ordinance. *Henry v. Cincinnati*, 1 C.C.(N.S.), 289, followed in preference to *Butler v. Cincinnati*, 2 C.C.(N.S.), 376.

Walter M. Schoenle and Saul Zielonka, for plaintiff.

M. Muller and Joseph W. O'Hara, contra.

GORMAN, J.

On August 17, 1914, the city of Cincinnati, through Walter M. Schoenle, its solicitor, upon the direction of the city council filed a petition in the above entitled cause, alleging in substance that the defendant company, a corporation under the laws of Ohio, is engaged in the business of manufacturing and generating electricity and supplying the same for commercial purposes to consumers within the city of Cincinnati, and that without warrant or authority of law and without the consent of or permission from the city, and contrary to its ordinances, has constructed conduits and has laid wires under certain public highways of the city, to-wit, Walnut street, between Fifth and Sixth

streets, Vine street, between Fifth and Sixth streets, and Hatters alley, between Vine street and Lodge alley; and it further averred that said defendant is about to extend its conduits and wires under, along or over said streets and other streets and alleys, and is now supplying or about to supply thereby electricity for commercial purposes to consumers, and will do all of said things unless restrained by order of this court. Plaintiff prays that the defendant be perpetually enjoined from doing the things complained of until it shall secure the consent of the proper city authorities to lay and maintain said conduits and wires in the public ways of the city, and that it be ordered to remove those conduits and wires now laid without authority, and that a temporary restraining order issue pending the hearing of this cause, and for such other and further relief as it may be entitled to.

Summons was issued and the defendant brought into court.

On motion of the plaintiff the defendant, on August 26th, was temporarily restrained, until the further order of the court, from further laying any conduits or wires under or through any of the streets or alleys named in the petition and from using the conduits through Walnut street and Vine street and from transmitting electrical current through said conduits and wires in Vine and Walnut streets.

By amended petition plaintiff avers that the defendant has also laid or is about to lay conduits or wires in Fountain alley, between Fifth street and Sixth street, and prays that it may be enjoined as to this alley also, as well as to the other streets and alleys.

On October 13, 1914, an answer was filed by the defendant admitting most of the averments of the petition and amended petition. It denies that said conduits and wires were laid without authority of law or without the consent of the city authorities. By way of further answer to the plaintiff's amended petition it avers that said conduits and wires referred to in plaintiff's petition were installed by it and with the consent of the owners of the real estate abutting upon said streets and alleys where said conduits and wires are laid; that said conduits and wires are laid at a depth of not less than nineteen feet below the surface across said streets and alleys; that they do not interfere in any way with other conduits or wires or with any present use of said

1914.]

Cincinnati v. Light Co.

streets by plaintiff, or with any use which plaintiff has a right to make thereof, and that they were laid without tearing up the surface of said streets or in any way interfering with the use thereof by the plaintiff or the public.

Defendant further avers that it is the owner of and has installed at large expense a modern plant for generating and distributing electricity and is now furnishing the same at reasonable rates and that it has complied with the laws of Ohio and the rules and regulations of the Public Utilities Commission of Ohio with reference to generating and distributing electricity.

Defendant further avers that under the authority granted plaintiff by the laws of Ohio to regulate the mode and manner of distributing electricity, the plaintiff, by its council, passed Ordinance No. 2585, April 21, 1911, which was duly approved by the mayor, and by the provisions of Section 647 thereof the business of furnishing and distributing electricity for illumination and power is regulated and provided for; that said ordinance is in full force and effect and that it has complied with all the provisions thereof in so far as the same affects its business and that by reason thereof the plaintiff has exhausted its power in the premises and has no legal authority to impose further conditions on its business.

Defendant further avers that on August —, 1914, after the commencement of this action, it sought to procure from the council of the plaintiff the passage of an ordinance granting to it permission to install and maintain the conduits and wires under the alleys named in the petition; that the committee on light of said council refused to recommend and the council refused to pass said ordinance because plaintiff was then negotiating with the Union Gas & Electric Company and had under consideration a contract with said company for furnishing light and power to plaintiff and its citizens, and that final action on said ordinance it was recommended should be postponed until the final determination of this action by this court.

Defendant further avers that the request to bring this action was made by the Union Gas & Electric Company, an Ohio corporation, which has been furnishing electricity and power to the city of Cincinnati and its citizens for some time past and is now furnishing the same under an agreement for that purpose; and

that said, the Union Gas & Electric Company, is the real party in interest in this action.

Defendant further avers that the practically exclusive right now given to said Union Gas & Electric Company by plaintiff has resulted in the charging of unreasonable and unjustifiable rates therefor, and operates to the loss and damage of the plaintiff and its citizens in that behalf; that the sole purpose of the bringing and maintaining of this action is to prevent competition with said Union Gas & Electric Company and to prevent defendant company from furnishing electric light and power to consumers in said city at a much lower rate than that charged by the said the Union Gas & Electric Company.

Defendant further avers that said Union Gas & Electric Company has installed its conduits, poles and wires upon and below the streets of plaintiff under the ordinance, No. 2585, above referred to, without obtaining special permission from plaintiff or its officers, and that there has been no objection to or interference with the said company on account thereof by the plaintiff.

Defendant avers that by reason of the premises the plaintiff is estopped from asserting the claim set up in its petition and amended petition herein and is not entitled to the equitable relief therein demanded; and that it asks to be hence dismissed with its costs.

By reply plaintiff denies that this action was brought upon the written request of the Union Gas & Electric Company and denies that said company is the real party in interest herein; but avers that the action is brought at the direction of the city council of Cincinnati; and denies each and every allegation of the answer except that defendant sought to procure the passage of an ordinance through the city council granting it permission to lay its conduits and wires and that the light committee of the council and the council took the action alleged in the answer and for the reasons set out in the answer, which averments of the answer are admitted to be true.

The case came on to be heard before the court on its merits and on the above pleadings and the agreed statement of facts and was submitted to the court on oral arguments of counsel and briefs thereafter filed by counsel for the parties.

1914.]

Cincinnati v. Light Co.

From the facts admitted in the pleadings and the agreed statement of facts submitted by counsel, it appears that the defendant company is duly incorporated under the laws of Ohio and authorized to manufacture, generate and furnish to consumers electricity; that it has laid its conduits and wires in the streets and alleys named in the pleadings without any special grant or permit from the city council; that it has received the consent of the abutting property owners to lay said conduits and wires, and that said conduits and wires do not interfere with the plaintiff's or the public's use of said streets and alleys and that they are laid about nineteen feet below the surface, and that they do not interfere with other conduits, wires or other underground utilities, and that the surface of the streets and alleys was not broken in laying said conduits and wires.

The sole question of law which the court believes it is called upon to determine in this case is—(a) whether or not the defendant may legally lay its conduits and wires in said streets and alleys without the special consent or permit of the city of Cincinnati first had, and upon the consent of the abutting property owners alone; (b) or, if this has not been granted, then has the defendant company the right to lay its conduits and wires without the special consent or permit of council, under the provisions of Section 647 of Ordinance 2585 of the city, and by virtue of the authority granted to it by the statutes of Ohio?

This court delayed the hearing of this action after the same was brought in order to enable the defendant to secure, if possible, from the city council its special consent or permit to lay its conduits and wires in said streets and alleys, upon the theory and belief that although no such consent or permit was granted before the laying of the conduits and wires, nevertheless, if consent was afterwards given it would in effect be an acquiescence on the part of the city and would be equivalent to consent given beforehand; and if such consent had been given by the council then this action would be dismissed as there could be no valid grounds upon which the injunction should be continued. But such consent, permit or grant having been delayed until after the final action by this court in this case, nothing remains for the court to do but to pass upon the merits of the controversies.

Under Chap. 2, Tit. IX, Div. II, Subdiv. II, of the General Code, Vol. 4, Sections 9170 to 9198, provision is made for telegraph, telephone and electric light companies to use and occupy the streets and highways of a municipality, county or state.

Under Section 9170 it is provided that a magnetic telegraph company may construct telegraph lines, from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but shall not incommode the public in the use thereof.

Section 9171, among other things, provides that no such company or companies and the owner or owners of the right-of-way shall contract for the exclusive use thereof for telegraphic purposes. These companies are given the right of eminent domain by the provisions of Section 9178. If the municipal authorities and the companies can not agree upon the mode of using the street, then the probate court of the county shall have jurisdiction to hear and determine the matter and to direct in what mode the telegraph line shall be constructed along such street, alley or public way, so as not to incommode the public.

By the provisions of Section 9192, all the provisions of this chapter relating to telegraph companies shall apply to electric light companies, except the provisions contained in Sections 9178 and 9179. Section 9178 confers jurisdiction on the probate court to fix the manner and mode of using the street when the municipal authorities and the company can not agree. Section 9179 prohibits the municipal corporation to demand or receive compensation for the use of a street, alley or public way beyond what may be necessary to restore the pavement to its former state of usefulness.

It would appear, therefore, that the Legislature has taken away from the probate court the power of determining the manner and mode of using the streets by an electric light company in cases where the company and municipal authorities can not agree, so that if there is no power to review the action of the municipal authorities in refusing to grant an electric light company the right to use the public streets and ways, for the installation of conduits and wires, then the action of the municipal authorities in refusing a permit to use the street is final and conclusive and the municipal authorities have the power to grant

an exclusive right to an electric light company to use the public ways for lighting purposes; but Section 9171 forbids granting an exclusive right to any company.

The court is of the opinion, taking these sections together and construing them in a reasonable manner, that the provisions of these sections under the above chapter contemplate that the consent of the municipal authorities shall be exercised in a reasonable and not in an arbitrary manner, and that for a failure to exercise their power in a reasonable manner a court of competent jurisdiction has the power to require the municipal authorities to give consent, to any company having the right to furnish light to consumers, to the use of the street, prescribing only reasonable restrictions in the use thereof and requiring that any damage or injury done to the highway by reason of the installation of the conduits and wires shall be restored and that any injurious consequences resulting from the installation of conduits and wires shall be remedied and made good to the public and the private owners.

It is also manifest from a reading of the statutes that the power and authority to use the highways of a municipality for electric light purposes is conferred by the state and not the municipality, under the sections above referred to.

This conclusion was reached by the Supreme Court in the following cases: *Zanesville v. Tel. Co.*, 64 Ohio St., 67; *Farmer v. Columbus Tel. Co.*, 72 Ohio St., 526; *Queen City Tel. Co. v. Cinti.*, 75 Ohio St., 64.

The power vested in the municipality is only to prescribe the manner and mode of using the highways, and this power the court holds must be exercised reasonably and not arbitrarily. See *McQuillan on Municipal Corporations*, Sections 728, 738, also Sections 378, 729 and 1632.

It appears from the pleadings and admitted facts in this case that the council of the city of Cincinnati has passed a general ordinance providing in general terms the conditions and regulations under which those in the business of furnishing electricity within the limits of the corporation may use the streets and public highways of the municipality. This ordinance is known as No. 2585 and was carried into the codification of the ordinances of the city of Cincinnati in 1911, and appears as Section 647,

page 265, of said ordinances of the city of Cincinnati as codified by authority of the council of the city of Cincinnati.

A reference to this ordinance, which was offered in evidence, will disclose that whenever permission is by ordinance granted to any person, partnership or corporation to engage in the business of electrical illumination it shall be under the following express terms and conditions. The ordinance then provides in great detail what must be done by the individual, partnership or corporation in order to occupy the streets, lanes, alleys and highways.

It would appear, therefore, that the council of the city of Cincinnati has practically provided everything that is necessary for any company, which is authorized to carry on this business, to do in order to occupy the streets or any part thereof.

The court is of the opinion, however, that the express consent of the proper city authorities should be secured, if possible, before undertaking to lay conduits or wires in any of the public ways of the municipality. If the council should unreasonably refuse to grant the permission, the court is of the opinion that proper action may be taken either by mandamus or mandatory injunction to require the proper authorities to grant the consent to the company, authorized to do business by the state, to lay conduits and wires under reasonable restrictions and conditions, or in accordance with the provisions of the ordinance which the city council has already passed. If the city authorities may refuse this permit, then manifestly it lies in the power of the city authorities to grant an exclusive right to some one company to furnish light to the consumers in the municipality.

In the opinion of the court it was never contemplated that a monopoly of the lighting business for commercial purposes should be given to any one individual, partnership or corporation. This is not a case of public lighting or the lighting of public highways. There is no doubt that the municipality itself may make provisions for lighting the public ways by erecting its own plant and furnishing its own light, or it may contract with a company authorized to do lighting in accordance with the provisions of the statute. But in the case of private commercial lighting, as the court has said, the statutes do not contemplate that an exclusive right shall be given to any individual, partner-

1914.]

Cincinnati v. Light Co.

ship or corporation. See Section 9171, G. C., and authorities there cited.

In this case at the time the injunction suit was filed no special consent had been granted to the defendant company by the city authorities, nor had any request been made of the city authorities to grant permission to lay the conduits and wires in the streets named, and therefore the defendant company was not in a position to resist the city's claim that it had no authority to lay its conduits and wires, unless it be that no such consent was necessary because of the ordinance referred to, No. 2585, Section 647.

Since this action was brought the court gave the plaintiff and the defendant company an opportunity to agree upon the mode and manner of using the streets and alleys mentioned in the petition, but the city authorities have refused at this time to negotiate with the defendant company, and the question now is, whether or not this court shall enjoin the further use of the streets and alleys named by the defendant company and require the defendant company to secure the permit of the city authorities for the use of the streets and alleys.

In view of the fact that the city council, under Section 647 of the ordinance above referred to, appears to have made ample provision for the safeguard of the streets and alleys of the city against any injuries that may result from the laying of conduits and wires or the erection of poles or other appliances by an electric lighting company, and inasmuch as it appears that nothing need be done by the city authorities to enable the defendant company to lay its conduits and wires except to give the bare permission so to do, and in further view of the fact that the Union Gas & Electric Company, according to the pleadings and the admitted facts, has entered upon streets and alleys by the bare consent of the city and laid its conduits and wires in accordance with the provisions of Section 647 of the ordinance above referred to, and in further view of the fact that there has been no injury whatever done to the streets and alleys mentioned in the petition, the conduits and wires being nineteen feet or more below the surface and not interfering with any of the utilities in said streets or alleys, and in further view of the fact that the public interest requires that there be competition in the matter of furnishing electricity in order that the consumers may

secure the benefit of the lowest price possible for the use of electricity and in view of the fact that monopolies are abhorrent to the public generally except where the monopoly is under the control and direction and perhaps the ownership of the public itself, this court is not disposed to strain a point as a chancellor sitting in a court of equity to enjoin the doing of a thing which results in no injury to the city of Cincinnati, but the doing of which apparently results in a benefit to the citizens using electricity, and in further view of the fact that this action would not have been brought except upon the request of a rival concern furnishing electricity, an injunction in this case should not be granted.

But if there is any doubt as to the soundness of this conclusion, then the court is cited to two authorities in support of the contention of the defendant that the consent of the city is not necessary in a case of this kind. Both of these authorities are by our own circuit court and will be referred to hereafter in this opinion.

In the case of *Callen v. The Columbus Edison Electric Light Co.*, 66 Ohio St., 166, the court defines the rights of abutting property owners on a street in this language, in the second paragraph of the syllabus:

"An owner of a lot abutting on such street has a property interest in the street in front of his lot which can not be taken against his will except upon the terms provided by the Constitution, viz: that a compensation shall first be made in money." Citing several Ohio authorities which are approved and followed.

Judge Spear, in announcing the opinion of the court, employs this language on page 172:

"The determination of the rights of the parties in this case involves an inquiry respecting the interest which the owner of land abutting on the streets of a municipality has in those streets. As to the country highways it seems to be settled in this state that while the public has the right of improvement and uninterrupted travel, the abutting owner has the right to all uses of the land not inconsistent with this right of travel and improvement."

And on page 173 he employs this language:

"It seems plain that the effect of the provision (of statute) is not to vest in the municipality a fee simple absolute in the

1914.]

Cincinnati v. Light Co.

streets, but only a determinable or qualified fee, and what is granted to the city is to be held in trust for the uses intended, viz.: for street uses, and street uses only."

In short, it appears to be the law of this state that an abutting owner upon a street of a municipality or a highway in the country has a right to use the streets and highways for any purpose he may deem proper not inconsistent with the use of it as a street. He has the right of egress and ingress. He may lay water mains or electric light conduits and wires provided he does not interfere with the use of the street as a street, and he may grant the right to connect his property with the property on the opposite side of the street to any person, partnership or corporation desiring to make the connection provided it is done without affecting the rights of the municipality in the street.

We think this proposition of law is not only sound, but has been repeatedly asserted by the Supreme Court in numerous cases. See *Daily v. State*, 51 Ohio St., 348; *Schaaf v. C., M. & S. Railway Co.*, 66 Ohio St., 215; *Traction Company v. Parish*, 67 Ohio St., 181.

The court is of the opinion that giving full force and effect to Section 9195, which requires the consent of the municipal authorities under reasonable regulations to construct lines for conducting electricity for light and power purposes through the streets, alleys, lanes, squares and public places of such city or village, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, and the provisions of Section 9197 of the General Code, which requires the consent of the municipality to construct and maintain underground wires and pipes or conduits, and the provisions of Section 9193, which require the consent of the municipal authorities to place, string, construct or maintain a line, wire, fixture or appliance of any kind to conduct electricity for lighting, heating or power purposes through a street, alley, lane, square, place, etc., and which section extends the inhibition without the consent of the municipality to all levels above or below the surface of such public ways, grounds, or places, as well as along their surfaces, means that where there will be any interference with the right of the municipality in the streets it is necessary

to secure the consent of the proper municipal authorities before the work can be done.

The two cases referred to as decided by the circuit court of this county are:

Henry v. City of Cincinnati, 1 C.C.(N.S.), 289.

In this case, which was decided by Judges Sibley, Russell and Cherrington, sitting in the Circuit Court of Hamilton County to determine the case, on account of the absence of the duly elected judges of this circuit, an action was brought in chancery seeking to enjoin Mrs. Henry, trustee, as the owner of certain real estate in the city of Cincinnati, from stringing a wire from her property across the street to a neighbor's property within the same block, at a height of about eighty feet above the surface of the street. The city showed that no consent was given by the proper authorities for the stringing of this wire to carry electricity from the Henry property to a neighbor's property across the street. But the court held that the consent of the city was not necessary, that it was only necessary to secure the consent of the abutting property owners, Mrs. Henry and the person who owned the property opposite hers. The court on page 290 says:

"The sole contention on which the case is made to turn, is, that no right to do this has ever been granted by the ordinance of council. It is agreed the regulation of the use by plaintiffs are rather in harmony with the requirements of the city in that regard, and it at last resolves itself into the question whether they can make this use in the two features specified without the permission of the council. That resolves itself finally into what is the property right of a citizen under such circumstances in a city like this."

The court in that case expresses doubt as to whether or not the sections under consideration, 9193 and 9198, General Code, at that time Section 3471a, Revised Statutes, were intended to apply to a case where a conduit or wire was to be put across the street instead of through the street lengthwise, the language in the statute being an inhibition to place wires or conduits through the street, and the court in that case appeared to believe that stringing a wire across the street was not putting it through the street. But the court did not allow its decision to rest upon this

ground. It refers to the sections now under consideration in this case (Sections 9193 and 9198, General Code) but at that time Section 3471a, Revised Statutes. The court uses this language on page 291:

“Prior to going into the two points that I wish to state shortly, a statute passed in 1896 is cited with reference to such cases, and some one interested procured an amendment to Section 3471, designated as 3471a, which provides, that in order to subject the crossing of lots and alleys by persons in the way that is set out in this petition, through their own private arrangements to subject the same to municipal control, no person or company shall place, string, construct and maintain any line, wire, fixture, or appliance of any kind for conducting electricity for lighting, heating or power purposes, through any street, alley lane, square, place or land of any city, village or town, without the consent of such municipality, and this inhibition shall extend to all levels, above and below the levels of such public way, as well as along the surface thereof.”

The court then takes up a discussion of what is a street and what are the rights and authority of the municipality and abutting property owner in and to the street and the soil beneath the surface and the space above the surface of the street. And on page 293 the court says:

“I don’t find anything, any authorities, except general propositions that are in the books, that aside from what is necessary to the city’s use of the streets, not only for actual occupancy, but for regulative control, indicating the private owner has no rights; he may dig his hole underneath the street, and as we think he may make his use above it if he sees fit until you reach the line of the limit of use, or if it is still within the city’s control as to the mode of use.”

And on page 294 the court further says:

“But the city seeks to have a right to monopolize this use, to absolutely deny it to the private owner. That is the real point in contention. Now, what we think is, that the private owner may use the street in any way that is permissible by the ordinances of the city, so far as the mode of the use is concerned. where is it utterly impossible that it shall contravene any right of the city in its actual occupation and use. Now, that is the case here, and there is not anything in the authorities that perhaps exactly touch it. Only on general principles we have resolved it. We place it upon the ground that the property owner has a

right to use it in any way that does not contravene the city's use, and that conforms with its regulative control as to the mode of use. Upon that point there is no dispute between us. It is not worth while to prolong the discussion. It is not worth while for us to go into hair splitting distinctions on the authorities in the books. * * * We think the decree of the court below substantially gives the relief to which the plaintiff is entitled, and that decree may be entered in this court."

In other words, in that case, the circuit court of this county, in 1898, refused to enjoin the private owner from maintaining a wire over the street, which had been placed there without the consent of the city, upon the broad ground that the consent was not necessary where there was no interference with the city's use of the street.

The second case which was decided by the circuit court of this county, by a divided court, is that of *Butler v. City of Cincinnati*, 2 C.C.(N.S.), 376.

The syllabus of a circuit court decision is no part of the law and therefore we can not always accept the statement contained in the syllabus as the law of the case in a circuit court decision. In that case Judges Giffen and Jelke were unable to agree on a case very similar to the one at bar and Judge Swing, who did not sit in the case or hear it, was asked to come in and participate in the decision. The question was submitted to him as to whether or not he would agree with Judge Giffen or Judge Jelke. Judge Swing briefly stated that he was of the opinion that the Revised Statutes, Section 3471a, controlled and sided with Judge Jelke. The case was one in which the Butler estate had placed a conduit across an alley, at a depth of nineteen feet below the surface, the exact distance which the conduits in the case at bar are placed, and through this conduit wires were placed for the transmission of electric light from Butler's property to other property on the opposite side of the alley. The city undertook to sever the wires and remove them from the alley and Butler brought suit to enjoin the same. Judge Giffen was of the opinion that the injunction should be allowed. Judge Jelke was of the opinion that it should not be allowed, and Judge Swing, as stated before, sided with Judge Jelke. In deciding this case Judge Giffen, on pages 377 and 378, said:

"It is averred in the petition and not denied in the answer—

"That said wires are many feet below all water and gas pipes and all sewers and conduits which have been laid or will hereafter be laid in said alley. That said wires have been maintained under said alley for more than two years; that the maintenance of said wires in such place and at the great depth of nineteen feet has in no way interfered with the use of said alley by the public or by the city of Cincinnati; that the continued maintenance of said wires at such depth can not at any time interfere with the use of said alley by the public or by the city or its board of public service or its successors, or any agent or officer of said city, for any municipal purposes or use whatever."

"This being true, the plaintiffs, by maintaining the wires, are infringing upon no right of the city or of the public; but are exercising a right incident to their easement of ingress and egress."

And again he says on page 378:

"Every individual's property is subject to proper and reasonable police regulations, as was attempted by Section 3471a, Revised Statutes; but applied to the facts admitted by the pleadings in this case the inhibition of the statute is not only unreasonable, but, without just cause, deprives the abutting owner of land of a substantial property right."

Judge Jelke in his opinion in this case refused to follow the case above cited of *Henry v. City of Cincinnati* and refused to concur with the reasoning of the court in that case. Judge Jelke was of the opinion that the city of Cincinnati had a base or qualified fee to the street and that there can be no interference with the streets except by the consent of the city. He bases this opinion upon the decision in the case of *Callen v. Electric Light Company*, 66 Ohio St., 173, and *Traction Company v. Parish*, 67 Ohio St., 190. He says on page 379 of the case which he is deciding:

"So long as the city maintains the purposes for which it is vested with title, this estate is a fee and as such co-extensive with a fee title in any owner of any other property."

In view of the conflicting authorities of our own circuit court, this court is of the opinion that the first case, the *Henry* case, decided by a unanimous bench against the contention of the plaintiff in this case, is entitled to greater weight than the decision in the *Butler* case, 2 C.C.(N.S.), 376, which was decided by a di-

vided court. Each of these decisions is entitled to great weight by the court of common pleas of this county and each of them ought to be binding upon this court if they were not in conflict; but where the questions involved are identically the same and there is a contrariety of opinion as to what is the law, this court feels that it is at liberty to follow the decision of either, and believing that the decision in the Henry case is founded upon better reasoning and sounder principles of law and is further supported by the opinion of Judge Giffen in the second case cited, whose reasoning appeals also to this court, the court is disposed to follow the decision in the Henry case and does hold that the plaintiff, the city of Cincinnati, has not, upon the pleadings and the admitted facts in this case, shown good grounds for the issuance of a perpetual injunction in this case.

The temporary restraining order heretofore issued herein will be dissolved and the plaintiff's petition will be dismissed at the costs of the plaintiff. If it should be adjudged necessary to secure the naked consent of the city authorities to further lay conduits and wires across the streets or alleys of the city by the defendant company, the court is of the opinion that a refusal to give the consent may be enforced by proceedings in mandamus against the proper city authorities or by mandatory injunction to require the consent to be given to lay the conduits and wires in accordance with the terms and provisions of the city ordinance heretofore referred to under Section 647.

For the present it is only necessary to hold that the plaintiff is not entitled to the relief prayed for and that the petition should be dismissed and the temporary restraining order heretofore issued herein dissolved.

1914.]

Egg Case Co. v. Railway.

LOSS OF MERCHANDISE BY FLOOD WHILE IN TRANSIT.

Common Pleas Court of Champaign County.

**URBANA EGG CASE COMPANY V. THE NYRANO RAILROAD COMPANY
AND THE ERIE RAILROAD COMPANY.**

Decided, September 15, 1914.

*Negligence—Not Proximate Cause of Loss—Where Concurrent With
an Act of God and the Loss Not One Which Could Have Been Fore-
seen.*

A shipment of merchandise was received by the E. R. R. Co. at Urbana, O., on March 20th, 1913, for shipment to Cincinnati, Ohio. In the course of transportation, the shipment arrived at Dayton on the same day and was delivered to a connecting carrier for transportation to Cincinnati. While awaiting further movement in the yards of the latter carrier at Dayton, the shipment was destroyed in the flood occurring on the morning of March 25th, 1913, which was an unusual, extraordinary and unprecedented flood, amounting to an act of God, which the carriers could not reasonably have anticipated; *Held:*

That the act of God and not the delay, although they existed concurrently in point of time, was the approximate cause of the loss, and that, therefore, defendants are not liable.

MIDDLETON, J.

This action is brought to recover for certain merchandise shipped by plaintiff over defendant's line of railway, from Urbana, Ohio, to Cincinnati, Ohio, on the 20th day of March, 1913, and lost at Dayton, Ohio, in transit, March 25th, 1913. The value of the merchandise so lost is placed at \$547.81, which plaintiff claims with interest at the rate of six per cent. from the 26th day of March, 1913.

The averments of the petition in substance are that plaintiff is a corporation, and that the Nypano and Erie Railroad companies are corporations; that the Nypano Railroad Company is the owner of a railroad running through Urbana, Champaign county, Ohio, which is leased to and operated by the Erie Railroad Company; that said companies are common carriers of

goods for hire, from Urbana to Cincinnati by way of Dayton; that on the 20th day of March, 1913, plaintiff delivered to defendants at Urbana the following merchandise: 50 cases straw board fillers packed; 12 sets in gum wood cases; 2 bundles straw board flats; 325 cases medium straw board fillers packed; 12 sets in gum wood cases; 325 cases medium straw board fillers packed; 12 sets in cotton wood cases; 30 bundles extra straw board flats.

That defendants received said merchandise into their custody and possession at Urbana, and promised and agreed to immediately ship the same to Cincinnati, and that defendants shipped said merchandise away from Urbana on the 20th day of March, 1913, but that the same had not arrived at Cincinnati on the 26th of March, 1913, but was delayed at Dayton; that on the 26th of March, through the carelessness and negligence of defendants in failing to ship said merchandise out of the city of Dayton to Cincinnati, said merchandise was destroyed; that by the use of ordinary diligence, the defendants could have shipped all of said merchandise to its destination at Cincinnati before its destruction by a flood which occurred on the 26th day of March, 1913, at Dayton; and that by said carelessness and negligence of defendants, said merchandise was lost to plaintiff. Wherefore, plaintiff prays judgment against the defendants in the sum of \$547.81 with interest.

Separate answers are filed by the Nypano and Erie Railroad companies—the Nypano Railroad Company by answer admitting several formal allegations of the petition, but denying each and every other allegation in the petition contained. The Erie Railroad Company, admitting certain formal allegations of the petition, further admits that on March 20th, 1913, plaintiff delivered to it certain merchandise for shipment to Cincinnati; that said property had not on March 26th, 1913, arrived at Cincinnati, and that said property was damaged in a flood occurring in the city of Dayton, and that said flood occurred on March 25th, 1913; but denies each and every other allegation in the petition contained.

For a second defense it avers in substance that plaintiff entered into a written agreement for the carriage of said mer-

1914.]

Egg Case Co. v. Railway.

chandise with defendant, and that defendant agreed to carry and deliver said merchandise to its destination if on its route, otherwise to another carrier en route to its destination, and that in said contract it was provided that no carrier or party in possession of the property therein described should be liable for any loss thereof or damage thereto or delay caused by the act of God, and says that while said property was at Dayton in course of transportation, there occurred a great and sudden flood of water in and through the city of Dayton, and the car containing said shipment was caught in said flood; that the flood occurred in the early morning on the 25th of March, 1913, and was an unusual, extraordinary and unprecedented flood occasioned by heavy rainfall which caused the Great Miami river and other streams and natural water-courses in and about the city of Dayton, to overflow their banks and inundate the valley in which said city is located; that said rainfall was the greatest that has occurred in the valleys of the Great Miami river in an equally short time and at the same season of the year, for many years past, and that the high water mark of the Great Miami river and other streams were exceeded by several feet; that said flood of water arose so suddenly and unexpectedly and was of such volume that there was no opportunity to save or protect plaintiff's said property or other freight in possession of carriers at Dayton; and avers that this flood was the proximate cause of the damage to plaintiff's merchandise, and that said flood was an act of God; and prays to be dismissed with costs.

For reply to the second defense of the answer of the Erie Railroad Company, the plaintiff denies each and every allegation and averment therein contained not admitted to be true and prays as in its petition.

The issues thus made by the pleadings are submitted to the court upon an agreed statement of facts. The essential facts agreed upon are as follows: that plaintiff and defendants are each corporations, as averred; that defendants are common carriers; that on the 20th of March, 1913, plaintiff delivered to defendants, through their agents and employees, at Urbana, the merchandise set forth in plaintiff's petition; that the same was reasonably worth the sum of \$547.81; that defendants agreed

to transport the same with reasonable dispatch to Cincinnati, Ohio, the point of destination; that said merchandise was shipped by defendant from Urbana, Ohio, on its railroad March 20, 1913, car leaving Urbana at 1:50 P. M. of said date, and that it arrived at Dayton at 4:25 P. M. on the same day; and that said car had not arrived at Cincinnati on the 26th of March, 1913; that the distance between Urbana and Dayton is between thirty-five and forty miles and the distance between Dayton and Cincinnati about sixty miles; that the usual time occupied in shipping a car of freight from Urbana to Cincinnati is less than twenty-four hours when no accident occurs to prevent it; that plaintiff made out and delivered to it a bill of lading; that said bill of lading provided on the back thereof that defendant should not be liable for any loss or damage to said goods caused by the act of God or for any delay caused by an act of God; that said property was damaged in the flood which occurred in the city of Dayton; that said flood occurred in the morning of March 25th, 1913, and was extraordinary and unprecedented and was occasioned by heavy rains; that said flood of water rose suddenly and unexpectedly and was of great violence, and that said flood was an act of God, and that defendants could not reasonably have anticipated said flood; and that if said delay by the defendants in shipping said merchandise had not occurred, the same would have arrived at its destination before its destruction by the said flood in Dayton.

The legal questions necessary for a determination of the rights and liabilities of the parties arising upon the agreed statement of facts, have been thoroughly and ably discussed by counsel, orally and by briefs; and the court has endeavored to devote to the consideration of the questions involved, that time and care which the importance of the case demands.

Counsel have rendered very material aid to the court in its consideration of the case, not only by their examination and presentation of authorities and thorough discussion of the same, but also by agreeing upon all the essential and material facts necessary to a determination of the question of the liability of the defendants for the loss sustained by the plaintiff.

It is agreed that the merchandise delivered to the defendants on March 20th; that the car containing the same left Urbana at

1914.]

Egg Case Co. v. Railway.

1:50 P. M. on that date and arrived at Dayton at 4:25 P. M. of the same afternoon; that it is about sixty miles from Dayton to Cincinnati and that the usual time occupied in shipping a car of freight from Urbana to Cincinnati is less than 24 hours, and that the car had not arrived at Cincinnati on the 26th day of March, 1913, or six days after the date when the car left Urbana.

These admitted facts the court is of the opinion show an unusual and unnecessary delay in the transportation of this merchandise from Urbana to Cincinnati, and therefore negligence on the part of the defendants in delaying the shipment as averred in the petition of the plaintiff.

It is further agreed that the bill of lading provides that the defendants should not be liable for any loss or damage to said goods caused by the act of God or for delay caused by the act of God; that said property was damaged in the flood which occurred in the city of Dayton on March 25th, 1913, and that said flood was an act of God, and that defendant could not reasonably have anticipated the same, and that if the delay by defendants in shipping the merchandise had not occurred, the same would have arrived at its destination before its destruction by the flood in Dayton.

The sole and only question therefore for the court to determine is whether the flood or act of God was the proximate cause of the loss of the merchandise, or whether defendants' negligent delay in transporting the merchandise concurred with the flood or act of God in causing its destruction. If the act of God was the sole, proximate cause, the defendants are not liable. If the wrongful act of negligence of the railroad companies concurred with the act of God in causing the loss, then the railroad company would be liable.

The question for consideration and determination is correctly stated by counsel for the plaintiff in their brief as follows:

"Whether or not the carrier is liable for the loss, who by a negligent delay in transporting goods, has subjected them in the course of transportation to any peril which has caused their destruction, at the point where the delay occurred and whilst the wrongful act was in operation and force or the negligent delay continued, and for the consequences of which the carrier would not have been liable had there been no negligent delay intervening."

An examination of the authorities on this question discloses a conflict in the decisions of the courts in the different states and in some federal courts. Authorities have been cited in the briefs filed and frankly and fairly discussed by counsel in this case, both for the plaintiff and the defendant, and have been carefully studied and considered by the court, but the court will not undertake here a further comparison or consideration of the same, as to do so would serve no valuable purpose and would extend this opinion beyond what is necessary to a clear statement of the reasons for the conclusion reached by it. The court has endeavored in its consideration of the case, to ascertain and apply if possible the underlying principles of the law of negligence, as announced by various decisions rendered by the Supreme Court of the state of Ohio, deeming this a safer course than to undertake to apply to the case any of the reasoning found in the conflicting opinions rendered by the courts of other states.

The court has already stated that if the flood or act of God that caused the destruction of plaintiff's merchandise was not the proximate cause of the loss, the defendant would not be liable; but that if defendants' negligent delay in shipping the goods was a concurring proximate cause of the loss, then defendant would be liable. It becomes therefore essential to determine whether the negligent delay of the defendant in transporting the merchandise from Urbana to Cincinnati was a concurring proximate cause of the loss.

It is admitted by the agreed statement of facts that the act of God destroyed the goods and that this act of God could not have been reasonably anticipated by the defendant; also that in point of time, the act of God and the negligent delay of the defendant concurred in causing the loss. But a careful consideration of the principles involved in the question, leads the court to the conclusion that concurrency in time merely in this respect is of no legal importance unless there was also concurrency in proximate results. In other words, when we speak of two negligent acts concurring in producing a loss or injury, we do not mean so much that they happened at the same time as we do that the immediate or proximate results of the commission

1914.]

Egg Case Co. v. Railway.

of the two negligent acts concurred in producing the loss or injury.

It becomes important then to determine first, if we can, just what is meant by the immediate and proximate result of a negligent act, so that we can then see whether the immediate and proximate result of the negligent delay of defendants in shipping the merchandise in this case was its loss by the act of God or the flood.

On this question the latest expression of our Supreme Court in *Miller v. R. R. Co.*, 78 O. S. Rep., 309, is decidedly illuminating. The law is stated in the syllabus of that case as follows:

"1. In an action to recover damages for injury sustained through the negligence of another, the law regards only the direct and proximate results of the negligent act as creating liability against the wrong-dower.

"2. In contemplation of law, any injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable."

And on page 325, Crew, J., in announcing the opinion of the court says:

"The rule is elementary, that a defendant in an action for negligence can be held to respond in damages only for the immediate and proximate results of the negligent act complained of, and in determining what is the direct or proximate cause, the rule requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequences as under the surrounding circumstances of the particular case might and should have been foreseen or anticipated by the wrong-doer as likely to follow his negligent act."

So that in determining in this case whether the negligent delay of the defendant was a concurring proximate cause of the loss, the rule requires that the loss should be the natural and probable consequences of the negligent delay. In other words, as stated in the opinion of the court in the case just quoted from, the loss of the merchandise or injury sustained by the plaintiff must have been such consequence as under the surrounding circumstances of the case might and should have been foreseen by the defendant railroads as likely to follow their delay in ship-

ping the goods. If, under the surrounding circumstances, the defendant railroad company might and should have foreseen or anticipated that by reason of their negligent delay in shipping the merchandise, it would be injured or destroyed by the act of God or flood which did destroy it, then the defendant would be liable. But if, under all the surrounding circumstances of the case, the defendant railroad companies could not foresee or anticipate that their negligent delay in shipping the goods would result in their being injured or destroyed by the act of God or the flood which did destroy them, then the railroad company would not be liable.

Whether the defendant railroad companies might and should have foreseen or anticipated that their unreasonable delay in shipping this merchandise would likely result in its being destroyed by the flood or act of God is answered by the agreed statement of facts, page 2, in this case as follows: "It is agreed that the defendants could not reasonably have anticipated said flood."

The Supreme Court of Ohio in the case of *Daniels v. Ballentine*, 23 O. S., 532, has considered and decided a question very similar to, if not entirely like the one involved in the case at bar, the only difference between that and the case at bar being that in that case the unreasonable delay in the voyage by which the goods or property lost was being transported had ceased and the voyage had been resumed when the storm or act of God injured the goods or property. In the case at bar the unreasonable or negligent delay was continuing at the time the flood or act of God destroyed the merchandise. But the court thinks this difference had no influence upon the decision reached by the Supreme Court in that case, and a careful study of that case leads the court to the opinion that the principle upon which the Supreme Court decided the question in that case applies with equal force to the case under consideration.

It is true that in the syllabus and in the opinion in the *Daniels-Ballentine* case, the court makes mention of the fact that the delay or suspension was over before the storm; but this court thinks not because it made any difference in the consideration of the case, but because that was the shape in which

1914.]

Egg Case Co. v. Railway.

that case presented the question of proximate cause, and the court very properly and naturally discussed and confined its decision to the kind of case it had before it. There is nothing in the discussion of the case by the court that implies that a different decision would have been reached had the storm occurred during the suspension of the voyage. On the contrary, the principle upon which the court based its decision applies just as strongly in a case where the negligent delay continued as in one where it had ceased, viz., that the act of God was not the proximate result of the delay because the two events had in the nature of things no natural or necessary connection.

In the discussion of the case this point is made very clear. The court says at page 539 that in suits at common law to recover damages for breach of contract or tort, the liability of the defendant depends upon the natural and probable connection between the breach of contract or tort and the alleged injurious consequences. Hence, in such cases, while the responsibility of the defendant is not necessarily restricted to the direct and immediate consequences of his fault, it does not extend to consequences which can not be regarded as the natural result of his conduct, and which on that account could not by ordinary forecast be anticipated.

The language of the Supreme Court in this connection is significant; *i. e.*, in substance that the liability of the defendant in a suit to recover for a tort or breach of contract, does not extend to consequences which can not be regarded as the natural result of his conduct, and which on that account could not, by ordinary forecast, be anticipated. On page 540 the court says:

“As the event proved, the storm would not have been encountered if no delay had occurred, but this was a merely fortuitous result. It was not a consequence which arose naturally, *i. e.*, according to the usual course of things, from the particular breach of contract complained of.”

This statement by the court would have applied with equal force had the storm been encountered while the barge was delayed in the St. Clair river, instead of after the delay and when the voyage had been resumed; and is a full answer to the claim

made in this case that the defendant railroad company is liable because the flood which destroyed plaintiff's merchandise occurred while the delay at Dayton continued.

The principle announced by the Supreme Court in *Miller v. B. & O. S. W. R. R. Co.*, 78 Ohio State, 309, and in *Daniels v. Ballentine*, 23 Ohio State, 533, appears to this court to be exactly the same, to-wit: that a defendant in an action for negligence can be held to respond in damages only for the immediate and proximate result of the negligent act complained of, and that in determining what is the direct or proximate cause, the rule requires that the injury sustained shall be the natural and probable consequence, or probable result, of the negligence alleged, *i. e.*, such consequence as under the surrounding circumstances of the particular case might and should have been foreseen or anticipated by the wrong-doer, as likely to follow his negligent act.

Not only is it agreed in the agreed statement of facts submitted to the court in this case that the flood which caused the loss of plaintiff's merchandise to recover damages for which this case is brought, was an act of God, and that the defendant railway company could not reasonably have anticipated such flood, but a full consideration of all the surrounding circumstances leads the mind of the court to the conclusion that the delay in shipment at Dayton was not a direct or proximate cause of the loss of the merchandise. The loss of the merchandise was, under all the surrounding circumstances, not the natural and probable consequence of the delay, *i. e.*, in the language of the Supreme Court in *Miller v. R. R. Co.*, the loss of the merchandise by the flood was not such consequence as under the surrounding circumstances of the case might and should have been foreseen or anticipated by the railroad company as likely to follow its negligent act in delaying the shipment.

Therefore, under the law as stated by the Supreme Court of Ohio, and for the reasons given, the finding in this case must be in favor of the defendants, and judgment awarded against the plaintiff for costs.

1914.]

Donnell v. Sugar Co.

**ACTION FOR RECOVERY OF MONEY PAID FOR
CORPORATE STOCK.**

Common Pleas Court of Cuyahoga County.

J. C. DONNELL v. THE CONTINENTAL SUGAR COMPANY AND
J. F. HARPER.*

Decided, May 18, 1914.

False Representations—Not Ground for Recovery Back by a Purchaser of Corporate Stock—Unless the Representations Are Shown Have been False and to Have Induced the Purchase.

An action does not lie for recovery back of the amount paid for corporate stock the purchase of which is alleged to have been induced by false representations, when the evidence shows that the representations related to the future policy of the company, and the purchaser knew that a large proportion of the new issue of stock had not been taken, and there is a failure to show by a preponderance of the evidence that he relied on the alleged false representations or was induced by them to subscribe for the stock, but on the contrary it appears that he was a man experienced in business matters, and had made an independent investigation of the affairs of the company issuing the stock, and that the mortgage which the company has been compelled to place on its property was made necessary by a disaster occurring subsequent to his subscription for stock.

Cline, Clevenger, Buss & Holliday, for plaintiff.

Squire, Sanders & Dempsey, contra.

ESTEP, J.

The plaintiff, in his petition, relies upon two grounds of false and fraudulent representations for the relief which he seeks in this action.

The first ground relates to the statement which he claims J. F. Harper, the president of the defendant company, made to the effect that of the increased stock enough had been subscribed to pay for the entire construction of the plant at Findlay, Ohio; that these subscriptions had been made by the Ameri-

*Affirmed by the Court of Appeals, November 16, 1914. Opinion by Grant, J.

can Sugar Company and by certain persons known as the Havermeyers, that the subscribers for the stock had contracted to fully pay the par value of said stock in installments, as rapidly as money was needed for the construction and completion of the Findlay plant.

It is not now claimed that any representations relating to the fact that the plant should be fully paid for, and the title thereto should be free from any mortgage lien or indebtedness whatsoever, are of any importance in this action. It is clearly the law that an agent of a corporation can not bind the corporation by any representations he might make as to the future financial policy of the corporation. That matter rests entirely in the hands of the directors of the corporation. It is also well settled law that a false representation must relate to a past or a present fact or condition, and not to some future event.

The second charge in the petition relates to the false and fraudulent representation claimed to have been made by defendant Harper, to the effect that he had persuaded said subscribers, the American Sugar Company and the Havermeyers, to relinquish their claims under their subscriptions to \$30,000 or \$40,000 of par value of said stock, for the purpose of selling and distributing the same among the residents of Findlay, Ohio. It is claimed in his petition that the plaintiff also relied upon this false and fraudulent representation in making the purchase of his one hundred shares of stock, and that it was one of the inducing causes of his said purchase.

It is not claimed by the plaintiff that it was represented that all of the \$1,000,000 additional stock had been subscribed for, but that only enough had been subscribed for to build the Findlay plant. In other words, the plaintiff knew that a large portion of the increased stock was in the treasury of the company.

Counsel for plaintiff, in his closing argument, only claims for this representation that it was a bait held out to the plaintiff by Harper for the purpose of creating in him a desire to possess some of this stock.

I can hardly come to the conclusion, considering the business experience of the plaintiff, and the fact that he knew all the increased stock had not been subscribed for, that he could have placed any reliance in any statement Harper may have made

to the effect that he was securing releases from other subscribers in order to let the Findlay people have any of this increased stock, or that this statement was an inducing cause for his purchase. There is some testimony which tends to show that Harper referred to the stock to be taken by the Findlay people as an "allotment" of stock. In the letter written by Harper to D. Kirk, Jr., a prospective subscriber, he refers to the fact that he would like Kirk, Jr., to subscribe, "provided it comes within the allotment which we named to Mr. Jones, namely, \$50,000."

There is also some testimony tending to show that the plaintiff had some knowledge as to the investigation of the American Sugar Company by the government, and that it was a question as to whether or not the American Sugar Company could subscribe for any of this stock.

Taking all the evidence into consideration relating to this alleged representation, I am of the opinion that the plaintiff, even if it was made, was not deceived by it, and did not rely on it in making his purchase of the stock in question.

In order to recover in a case of this character, the plaintiff must not only show that the false and fraudulent representation was made, but that he relied upon it, and that it was the inducing cause for his purchase of this stock. The law relating to the question of reliance is well stated in Kerr on Fraud, page 945, as follows:

"If a man to whom a representation has been made knows at the time or discovers before entering into a transaction that the representation is false, *or resorts to other means of knowledge open to him*, and chooses to judge for himself in the matter, he can not avail himself of the fact that there has been misrepresentation, or say that he has acted on the faith of the representation."

Conceding, therefore, that the representation relating to the fact that enough of the increased stock had been subscribed for to build the plant at Findlay, was made, and that this representation was false, has the plaintiff shown by a preponderance of the evidence that he relied upon this statement, and that it was the inducing cause of his purchase of the stock in question? In answering this question, as to whether or not plaintiff relied

upon the misrepresentation, it becomes necessary at the outset to consider who the plaintiff in this action is.

J. C. Donnell was a man of unquestioned business experience. He was president of the First National Bank, at Findlay, Ohio; he was the owner of a business block, which he rented, and was also the owner of a seven hundred acre farm, near Findlay, which he successfully farmed; he was also the president of the Ohio Oil Company, one of the large properties controlled by the Standard Oil Company. As stated by counsel for defendants, he was no child, but, on the contrary, was a man of large business affairs, accustomed to large transactions of a financial character, and appears to be fully capable of taking care of himself in a business transaction.

The new plant of the defendant company was under construction at Findlay in the summer of 1911. It was a large plant, estimated at that time to cost \$750,000, and which finally cost \$800,000 to \$900,000; the company at that time had outstanding stock in the sum of \$1,200,000, and had been successfully operated for about four years; it had paid 8% annually to its stockholders, and had accumulated a surplus of between \$300,000 and \$400,000; the outlook for the coming year for the sugar beet business was fine, and was exceptionally so by reason of the failure of the sugar beet crop abroad. The condition, financially, of the company at the time of the negotiations in relation to this stock was good. The company, by reason of the building of the new plant at Findlay, and the outlook of increased business, increased its capital stock to \$2,500,000. Of this increase, a stock dividend of 25% to its stockholders was made, thus increasing its outstanding stock to \$1,500,000, leaving \$1,000,000 in its treasury.

These facts, I believe, from all the evidence in the case, can fairly be said to have been within the knowledge of the plaintiff at the time he subscribed for this stock, to-wit, September 13, 1911.

The talk with Mr. J. F. Harper at the golf grounds took place the latter part of August or early in September, and at its close the plaintiff said he would consider taking a little of the stock.

After this conversation Harper left Findlay and did not return until some time later, and after September 13, 1911.

1914.]

Donnell v. Sugar Co.

On September 8th, at the request of plaintiff, the defendant Harper mailed him a financial statement of the company of date of March 1st, 1911, which so far as the testimony shows, *was true in all respects*. Mr. Jones, the cashier of the First National Bank, had received reports from mercantile agencies and from Fremont bankers as to the financial standing of the company. These inquiries were made largely on account of the fact that the defendant company carried an account at the bank. The plaintiff, being president of this bank, it can fairly be assumed that he knew something in regard to the investigation made in regard to the financial standing of the defendant company, particularly in view of the fact that the plaintiff and Jones were contemplating purchasing stock of said company. There is nothing strange in regard to these investigations, as the plaintiff, being a good business man, was naturally interested in ascertaining the financial condition of the company *prior to the purchase of the stock*. These reports and investigations were found to be satisfactory, and I am of the opinion that until late in October of 1911 the financial condition of the company was good, and the outlook for a prosperous year was all that could be desired.

In addition to all this, the city of Findlay, a place of about 15,000 inhabitants, was obtaining this large plant, which must necessarily have been a matter of pride to its citizens, and naturally would create a desire in the minds of its leading citizens to become to some extent financially interested in this plant.

It also appears from the testimony that the First National Bank owned or controlled a large area of sugar beet lands in this territory. If this is true, and Jones, the cashier, says it is, then this would be an additional motive to induce plaintiff to become a stockholder.

From all that I have said, can it be declared, by the preponderance of the evidence, that this stock was purchased by the plaintiff upon reliance in the statement made by the defendant Harper, that enough of the increased stock had been sold to pay for the Findlay plant? Isn't it more probable that the plaintiff, in the purchase of this stock, *relied* upon investigations made on his own account; upon his knowledge of the financial condition

of the company and its future outlook on September 13, 1911; his interest in sugar beet lands in the Findlay territory, and also his pride, as one of the leading citizens of Findlay, in having this large and expensive plant located in his home city? It appears to me that it is fair to conclude from all the testimony in this case that these things are the matters which primarily controlled and induced this experienced business man to purchase this stock.

In the spring of 1912, during the month of April, the company decided to place a mortgage of \$1,200,000 upon all its property, including the plant at Findlay. When plaintiff was advised of this action he at once tendered his stock to the company and demanded the return of his money. If it had not been for the placing of this mortgage upon the property, this law-suit would not have been filed. It is clear that in September, 1911, this mortgage was not in the contemplation of any person connected with the defendant company, as its financial condition and the outlook were good, and its stock was apparently a good investment. Unfortunately, in the latter part of October, 1911, heavy rains set in, and were of such long continuance that the sugar beet crop was practically ruined. The company owed the farmers about \$1,000,000. The loss by way of the poor beet crop amounted to about \$400,000. The result of all this compelled the directors, in order to tide over the company, to place this large mortgage upon its property.

This disaster had to be met in the only possible way, and as there is nothing to show that the matter was even in the contemplation of Harper at the time of the sale of this stock, I fail to see how it can be now urged, as a reason why the stock—which when the plaintiff purchased it was surely worth par—should be canceled and his money restored to him.

I am of the opinion, considering all the testimony in the case, that plaintiff should not recover, and his petition is therefore dismissed.

1914.]

Estate of Kohanyi.

**RIGHTS AND DUTIES OF AN ADMINISTRATOR UNDER AN
ORDER TO CONTINUE A BUSINESS.**

Probate Court of Cuyahoga County.

IN RE ESTATE OF E. T. KOHANYI, DECEASED.

Decided, July 3, 1914.

Administration of an Estate Under an Order to Continue the Business of the Decedent—Duties and Liabilities of the Administrator—What Are Proper Expenditures Under Such an Order—Extra Compensation for Extraordinary Services—Statutory Compensation Under an Order to Continue a Business—Allowed on Funds Under Control of the Administrator But Not Coming Into His Physical Possession—Attorneys Fees.

1. Where a going concern passes into the hands of an administrator, the court will rely on his ability to handle the business to the advantages of the estate and will not scrutinize acts of a discretionary character in the absence of any showing of bad faith or of incapacity.
2. It will be presumed in the absence of a showing to the contrary that an action brought against the estate was properly defended, and where such an action results in a judgment against the administrator he is justified in paying other claims of like character.
3. An administrator operating a business is entitled to statutory compensation on funds under his control and for which he is responsible, notwithstanding such funds did not come into his physical possession.
4. Where it appears that the business has been successfully conducted, the debts paid and confidence imparted to the enterprise, extra compensation which together with the statutory commissions to the administrator does not exceed three per cent. of all the funds passing through his hands, is regarded, under the circumstances of this case, as reasonable allowance.
5. A court would not be justified in such a case in ordering an examination to be made of the books of the business at the expense of the estate, where it is evident from the account filed by the administrator that the books have been well kept; but the books will be made accessible to interested persons desiring to examine them at their own expense.

Price, Alburn & Daoust, for administrator.

Reed, Eichelberger & Nord, for Charles Von Dobay.

Hugo E. Varga, for Bertha Kohanyi.

HADDEN, J.

E. T. Kohanyi, during his lifetime, was the owner and publisher of an Hungarian daily newspaper, *Szabadsag*, in this city. He died March 10th, 1913, intestate, and John H. Price was appointed administrator of the estate, and under orders of the court continued the newspaper business until such time as it should be deemed wise to turn it over to the heirs, or to sell it as a going concern. On the 28th day of March, 1914, the administrator filed his partial account, and to this four sets of exceptions were filed. Two of these were filed by Charles Von Dobay, acting as attorney in fact for the mother of the decedent, who resides in Hungary, a third was filed by the attorneys at law for Dobay, and the last was filed by the attorney for the widow.

The two exceptions filed by Dobay, for the most part, are general criticisms of the administrator's conduct and method of running the newspaper business. He criticises the administrator for employing F. Kiss in the West Side office, and claims that the administrator is using the newspaper as a tool, for settling private difficulties. He objects to the discharge of Polya and another old employee, and wants a public accountant to look over the books. He further insists on being appointed co-administrator and co-manager of the proposed corporation the heirs are forming. He objects to the formation of such a corporation, and insists that it should be a partnership. He claims that it is the administrator's own fault that so much of the administrator's time was consumed in the management of this business, and further that the administrator only did his duty and should not boast of his achievements in this enterprise, inasmuch as the increased circulation and prosperity of the paper was entirely due to the splendid men under him, and not to any efforts of his own. In one breath, he asks that the administrator collect all accounts outstanding, amounting to some \$17,000, and pay off

1914.]

Estate of Kohanyi.

the balance of the indebtedness, and in the next breath he objects because the administrator has collected so many outstanding accounts, saying that it will hurt the future business of the paper. He insists that the raises which were given the employees were not fairly applied, and that the administrator is biased in his conduct of the paper and acts on wrong information, and only appeared at the office once or twice a week when checks were to be signed.

I have stated these objections of the exceptor quite fully, although not at the same length in which they are set forth, in order that it may be seen just what their scope and effect is. It will be seen at a glance that they are general criticisms of the administrator's method of conducting the newspaper. They are not supported in any way by testimony, nor are they so formulated that the administrator can very well meet them in open court. No testimony was offered as to the truth of any of these statements, and if it had been, much of it would of necessity have to be held irrelevant. If the exceptor wants a public accountant to go over these books, the thing for him to do is to get one, and pay for the accountant out of his own pocket. The court does not think it would be justified in going to this expense for the estate, in view of the situation, but if any of those interested in the estate are not satisfied with the account as rendered, and want an accountant to examine the books, the books are accessible and at all times open for full investigation by any accountant sent by parties interested in this estate.

As to the discharge and hiring of employees, the court desires to say that it appointed Price administrator to take charge of this vast enterprise, because it had faith in his integrity, ability and business acumen to handle this business as it should be handled, and the court believes that he has done so to the best of his ability, and every act done by him was done in the belief that it would further the interests of the newspaper, and for the exceptor to say that the discharge of Dr. Polya was "unwarranted and unfair," or that Kiss should not have been employed because incompetent, is not getting us anywhere. The adminis-

trator must be allowed some latitude in doing this work, and if every act of his were to be scrutinized by the court, and made the subject of judicial inquiry, the court would have done better to take over the management of the paper itself, as it would be saving time in doing so. However, if the exceptor had any testimony tending to show that the administrator acted in had faith in these matters, he did not present it to the court, and in this situation, the court can pay no attention to his general complaints.

As to the exceptor's insistence that he be appointed co-administrator, and that the heirs should form a partnership instead of a corporation, it seems clear to the court that this is entirely irrelevant, and has no place in this proceeding. A great many other objections are of a similar nature. They are much on the same footing as if the administrator had chosen to say in his introductory statement, that it was a fine day when he was appointed, and the exceptor undertook to deny it. The court takes it that the introductory statement preceding the account, was made because of the administrator's desire to give the court all the facts, so that the court could pass intelligently on the account and the matters connected therewith.

And it might be appropriate to say at this point, that this account is a model of its kind. The administrator has done more than is required of him, as a rule. The law requires that he shall only account for receipts and expenditures, but he has in addition given a list of the debts of the estate which are still outstanding; likewise of the accounts receivable, of the amount of money invested in new machinery and new equipment for the newspaper, of the insurance policies in force at the time, and of the names, nature of duties and salaries of employees and agents of the newspaper; and although the account is quite lengthy (seventy-eight pages), it is so arranged and tabulated that the court can tell at a glance what the condition of the estate is, and what all the money was spent for. It is a pleasure to the court to look over an account in which the facts and figures are so easily accessible, and which is so well arranged.

1914.]

Estate of Kohanyi.

Some few items excepted to by Dobay are, of course, relevant and proper, but inasmuch as they are all included in the third series of exceptions, filed by the attorneys for the exceptor, they will be considered there. These third exceptions were filed April 28th of this year, and attack a great many items in the account. I have tried to group them, and I will consider them in the order of groups as gathered.

The first group contains exceptions to the payments to Mr. and Mrs. Klosz, as well as a judgment obtained by Louis Klosz in the common pleas court, for \$581. In the account appears the item: "July 3, Olerich & Co., Mr. and Mrs. Klosz's fare, \$249. Voucher No. 484." Mr. and Mrs. Klosz were the father and mother of Mrs. Kohanyi, and the exception is based on the ground that this was not a debt of the estate. It seems at the time that Mrs. Kohanyi was sick, and wanted her parents to come and visit her to cure her homesickness. Her husband, Mr. Kohanyi, sent a cablegram asking them to come, saying that he would stand all expenses, and he furnished two steamship tickets. The payment in controversy was for these tickets. Klosz sued the administrator in the common pleas court for \$781, for railroad fare and other expenses, not including the steamship fares, in crossing the ocean. The common pleas court held the estate liable to the extent of \$581, on the strength of this telegram. The exceptor, however, claims that the administrator did not defend this litigation as it should have been defended, and that the cablegram (written in Hungarian) was not rightly translated; and the exceptor furnished what he claims to be a correct translation. But there seems to be no practical difference between this translation and the one furnished the common pleas court, except that the former uses the words *thee* and *thou* where the latter uses *you*. No negligence or bad faith was shown in defending this suit, and if the common pleas court thought that this cablegram created an obligation on the part of the decedent to pay railroad fares and hotel expenses for his father and mother-in-law in their journey to this country, it would clearly follow that there was a like obligation on him to pay for their steamship fares, especially

when these same tickets were ordered to Paris by him to await their arrival; and it is therefore clear to the court that this was a proper debt of the estate and was therefore rightly paid; and the exceptions are overruled.

The second group of exceptions comprise the funeral expenses. As these appear in the account, they are as follows:

May 8, Cunard Steamship Co., \$100.00; voucher No. 220.

Aug. 1, Joseph Horvath, shipping body, \$93.98; voucher No. 627.

Feb. 28, Mrs. Kohanyi, funeral expenses, \$500; voucher No. 1740.

Mar. 12, Mrs. Kohanyi, funeral expenses, \$682; voucher No. 1776.

The decedent died in this city, and after the funeral here, the body was shipped to Hungary and was interred there with proper rites. The exceptor claims that the cost of the funeral was excessive. He admits that the mother's consent in Hungary was obtained for these funeral expenditures, but he claims that this consent was only binding for expenses which were not excessive and extravagant. At no time during the hearing did the exceptor point out as to what charge he thought was excessive or extravagant, except possibly the delay in New York, incidental to the shipment of the body. Just what this expense was, was not shown: This court authorized the shipment of the body to Europe, and the expenses of the Hungarian funeral were duly ordered paid by this court, February 28th, 1914. Whether the exceptor had any notice of this application and order of the court, at that time, was not shown, but inasmuch as no testimony was produced showing extravagant or negligent expenditures on the part of the administrator in conducting this funeral, the exception will have to be overruled.

The next exception goes to the salary and commissions paid John Biro. The items excepted to are these:

Mar. 15, Salary paid John Biro. Then follows an exception to John Biro's raise of salary.

1914.]

Estate of Kohanyi.

Aug. 1, John Biro, expenses, \$20; voucher No. 630.

Sep. 2, John Biro, \$5; voucher No. 781.

Oct. 11, John Biro, commissions on advertising, \$100; voucher No. 981.

Dec. 18, John Biro, overtime on Naptar, \$60; voucher No. 1352.

I can find no item of March 15th, 1913, for salary paid Biro, but I take it that possibly this exception goes to Biro's salary generally. Biro's salary first appears in the account as being \$125 a month. Later, it was raised to \$150 a month, and about January, this year, to \$175 a month. The administrator justified this by saying that Warms, who was the editor, was getting \$250 a month at first. Later he was sent to the New York office, and his salary reduced to \$100 a month, and Biro took over his duties with an increase of only \$25 a month, so that way the estate saved \$125 a month on the combined salaries of these two men. There is not a shred of testimony that Biro was incompetent and inefficient, and so far as I can see, the administrator was entirely justified in paying him the salary that he did. As for the \$20 and the \$5 items, the administrator's testimony was that these were to reimburse Biro for necessary and incidental expenses in performing his duties as editor of the paper. No reason was shown by the exceptor why Biro should be compelled to pay for these out of his own pocket. As for the \$100 item for commissions on advertising, the attack against it seems to be mainly on the ground that the administrator said that Biro was to get no commission for obtaining this advertising. The administrator testified that what he said was that Biro got no commission from the Mississippi Farms Company. He explained that it was a rule of the office, established by Kohanyi, that any employee who got advertising for the paper on his own time, should get ten per cent. commission. This applied to all employees, and the administrator said he knew that Biro had worked hard to get this advertisement. In this view of the situation, I can see no reason why he should not receive the commission so earned. As for the overtime work on the Naptar, amounting to \$60, the administrator explained that all employees

who worked overtime on the Naptar (a newspaper almanac issued by the paper for the new year) received pay for such overtime in proportion to the time consumed and their regular salary. This being so, and it clearly appearing that Biro put in extra time, I can see no good reason for an exception; and the exceptions to all the above items are therefore overruled.

The next group of exceptions go to the reimbursement for the administrator's expenses, and the part payment of commissions to himself. They are as follows:

Apr. 30, John H. Price, expenses to New York, \$48.50; voucher 203.

May 31, John H. Price, expenses, \$6.85; voucher 363.

June 9, John H. Price, expenses of trip to New York, \$86.55; voucher 431.

July 26, John H. Price, expenses of trip to New York, \$44.10; voucher 600.

Sept. 7, John H. Price, expenses of trip to Pittsburg, examination branch office, \$14.25; voucher 659.

Dec. 9, John H. Price, expenses trip to New York, \$50; voucher 1298.

Mar. 9, John H. Price, expenses to New York, \$45.80; voucher 1759.

June 10, John H. Price, compensation, \$200; voucher 385.

July 3, John H. Price, compensation, \$100; voucher 482.

July 15, John H. Price, cash, \$200; voucher 569.

Aug. 2, John H. Price, compensation of administrator, \$100; voucher 641.

Dec. 1, John H. Price, cash compensation of administrator, \$500; voucher 1264.

The exceptor claims that these items are excessive. The first seven items are all for expenses of the administrator made necessary by his trips to New York and other branch offices. The exceptor inquires, why these many trips (six in all) to New York? The administrator explains it by saying that the New York office brings in about \$25,000 a year, and personal conferences with the manager were at times necessary. The office in

1914.]

Estate of Kohanyi.

New York publishes a New York edition, and contracts had to be talked over and made, advertisements had to be secured, the books and files of the office had to be looked over, and arrangements made for shipping the body of the decedent to Hungary. All this made the personal presence of the administrator absolutely necessary, and it is clear to the court that these expenditures were reasonable and necessary, and he was therefore entitled to reimburse himself therefor. As for the items of personal compensation, amounting to \$1,100, it appears from the account that the administrator is entitled to statutory commissions in excess of \$3,000. Of this, the administrator has only taken \$1,100, and I can see no objection to his doing so under the circumstances, and the exceptions to all these items are therefore overruled.

The next group of exceptions go to W. E. Pagan's salary and commissions. The items excepted to are the following:

May 5, Walter E. Pagan, commission on advertising, \$145.78; voucher 216.

June 5, W. E. Pagan, commissions, \$127.77; voucher 372.

July 5, W. E. Pagan, commission on advertising, \$90.46; voucher 496.

Sept. 11. W. E. Pagan, expenses, to Buffalo, \$22.20; voucher, 834.

As to the first three items mentioned, the same thing can be said as was said in the case of Biro's commissions. Pagan earned the commissions by securing advertisements in accordance with a rule of the office, established during decedent's lifetime. His salary also was the same. Pagan's total income was about \$250 a month. This may seem a bit large, but when we consider that it is no larger than it was prior to Kohanyi's death and since there is no question but what he did the work, and did it well so far as the court is informed, no good ground is shown why these exceptions should be sustained, and they are therefore overruled.

The last item is that of Pagan's expenses to Buffalo, railroad fare, hotel expenses, etc. This trip to Buffalo was in the interests of the newspaper, and no testimony was introduced tending

to show that it was unnecessary, or that the expenses were excessive, and this exception therefore is overruled.

The sixth exception goes to the salary of Bernice Richmond. No particular item in the account is attacked, the exception going to all of the salary received. Miss Richmond is a typist in the office of the *Szabadsag*. Her salary during the greater part of the time of her employment, was \$40 a month, with the exception of the last three months, when it was increased to \$45 a month. The only objection which the exceptor seems to have to the employment of this young lady, is that she was not a Hungarian. The administrator explains that he tried to get a Hungarian girl to do the work, but was not able to find any. The court does not understand that there is any obligation laid upon the administrator that only Hungarians shall be employed, and the exception is therefore overruled.

The seventh group of exceptions go to the payments made to Mary Sztopak and Goczel. A sample item, picked out by the court at random, reads as follows: Aug. 4, Theodore Goczel, for his expenses, \$50; voucher 653. All these items are for the amount of \$50, and are not for the salary of these people, for the account shows a salary paid them in addition to this. The administrator explains these items by saying that the money was kept on hand in the office for incidental and small office expenses, such as postage, etc. The check was, as a rule, drawn in favor of Mary Sztopak, who was employed in the office, but she received no benefit from it whatever; and the exceptions are therefore overruled.

The eighth group of exceptions go to the payments to Ernest Kiss. They are as follows:

June 10, Ernest Kiss, \$200; voucher 387.

July 25, Ernest Kiss, in full of all acct. \$107.40; voucher 585.

The testimony shows that this was for insurance on the newspaper plant. It is therefore a necessary expense of the business, and the exceptions to these items are overruled.

The next exception goes to the payment to M. Zucker. This item is: Feb. 28, Max E. Zucker, pay roll, \$50; voucher 1738.

1914.]

Estate of Kohanyi.

This objection was made on the ground that the salary of Zucker had been more than doubled in the short time of his employment there. The account shows he was getting \$25 a week at first. At the beginning of the new year, 1914, he was given \$31.25 a week, and this was his salary at the time the account was filed. The court therefore fails to see how his salary was doubled. The item in question apparently is his salary from February 14th to February 28th, 1914. No testimony was introduced, nor any valid reason given, why this should not be paid him, and the exception is therefore overruled.

The tenth exception goes to the item of August 4th, which reads: Mrs. E. T. Kohanyi's interest in auto, \$300; voucher 656. The files of the court show that Kohanyi bought an automobile for \$615, in October, 1912. In February, 1913, his wife traded it for another car, paying \$450 of her own money in the bargain for the new car. Afterwards, the administrator sold this car for \$800, and after paying the lien on the car, the court ordered that \$300 be paid to the widow as representing the widow's interest in the car. As thus seen, it was her own money, and the exceptor's contention that this amounted to partial distribution, and therefore the mother should have thirty per cent. of it, is not well taken, and the exception is overruled.

The eleventh exception goes to the item of August 8th, which reads: John A. Ilburn, pay roll No. 31, Aug. 2 to Aug. 8, \$319.98; voucher 661. The administrator explained that he was out of town at that time, and he had authorized Alburn to look after the pay roll and pay the men when payday came around.

There was nothing improper in this proceeding, and the exception is therefore overruled.

The twelfth exception is to the item of October 13th, Eugene Fried, expenses to Chicago, \$25; voucher 984. This expense was incurred in the interests of the newspaper, in connection with the Chicago office, and the exception is therefore overruled.

The thirteenth exception is to the item of February 28th, Edward E. Daoust, expenses to Pittsburg, \$14.35; voucher 1737. This, as appeared at the time of the hearing was the personal expenses of Daoust in looking after the estate's interests in Pitts-

burg. The expense seems reasonable and proper, and the exception is therefore overruled.

The fourteenth exception is to the item of March 14th, Charles Von Dobay, pay roll No. 62, \$37.50; voucher 1786. The exceptor claims that he only got \$18.75. Voucher No. 1786, dated March 19th, is a statement from the bank that check No. 19460, payable to Charles Von Dobay, had been certified for \$37.50. It is clear to the court, therefore, that the exceptor got a check for the amount claimed by the administrator, and the exception to this item is therefore overruled.

The fifteenth exception goes to every item in Schedule D. Schedule D is an itemized statement of all the receipts. It does not attempt to give all the various items, but it only purports to give the total daily income, both gross and net. The exceptor, neither in his exceptions nor at the time of the hearing, advanced any ground for his objection to this schedule, and the only objection that the court can possibly see, is that the administrator did not put down all the items from which this income was derived. The administrator, at the time of the hearing, explained that this was not done, for the reason that there are fully fifty thousand such items, and it would require four large volumes in order that each item might be separately stated. This would not only take a great deal of time, but it would also unnecessarily increase the size of this account, making it too bulky and voluminous, as well as greatly increase the court costs. This, of course, would not be an insurmountable obstacle if anything were to be gained by such an accounting; but inasmuch as the books of the office are open to all the parties interested, and they have had full access thereto, I do not think that this is necessary, and should therefore not be required in this instance, and these exceptions are therefore overruled.

The only other matters excepted to are the extra compensation asked for by the administrator, and his request for an allowance for attorney's fees. These are really objections to the allowance of fees and compensation, and will be considered in connection with the motions for extra compensation and allowance of attorney's fees, made by the administrator.

1914.]

Estate of Kohanyi.

Now taking up the exceptions raised on behalf of the widow, filed May 5th, 1914, it seems that the first exception is that the administrator is only entitled to statutory commissions on \$154,917.89, instead of \$180,506.75. The difference between the two amounts is caused by the fact that the expenses of the branch offices and agents' commissions are first deducted, and the balance is at stated intervals sent to the Cleveland office. The first amount mentioned, namely, \$154,917.89, is the actual amount of money which came into the Cleveland office, while the other amount, \$180,506.75, is the actual amount taken in by all the offices and from all sources. The exceptor's contention is that not all of the latter amount passed through the administrator's hands, and compensation can only be computed on the amount which he actually got. The administrator testified in this connection, that the branch offices had no bookkeepers, and all the bookkeeping was done in the Cleveland office, and that all the branch office agents are under contract with the administrator subject to his orders, and that he supervises the work of the branch offices, and that all their work is done as employees of the administrator. It seems to the court that this is a clear case of principal and agency, and the agent's possession is therefore the principal's. The liability of the administrator extends to the money taken in by his agents, and not merely to that turned over to him. If the agent loses it negligently, the administrator would be liable for it. To hold otherwise would be to cut off the branch offices entirely from the authority of the administrator, and make them independent concerns, whereas they are really acting under the control and authority of the administrator. It seems to me, therefore, that the administrator received the amount of money handled by the agents, and his commission should be computed on \$180,506.75, making a total statutory compensation of \$3,730.13; and this first exception is therefore overruled.

The second and third exceptions are really objections to the allowance of extra compensation and attorney's fees, and will be taken up in their proper order.

The fourth and last exception was withdrawn at the time of the hearing, by the exceptor.

Taking up now the application of the administrator for extra compensation for extraordinary services, I find that in addition to the \$3,730 statutory commissions, the administrator asks \$1,070. This would make his total compensation for the year, \$4,800, or \$400 a month. The main objection to the allowance of such extra compensation is on account of the total size of the entire compensation. Objector's claim is that a total of \$4,800 for a year's work is excessive from its very nature, and should not be allowed. It does not strike the court that the fee asked for is excessive *per se*. We must look to all the factors in this situation before that can be determined. What were the difficulties to be overcome? What were the results obtained? How much time was spent? Was there any work done which was extraordinary for an administrator? What proportion of the fund created is asked for as compensation? All these are questions to be considered in determining whether the administrator is entitled to extra compensation, and if so, how much.

One of the first things that strikes the court as being extraordinary, in the sense that the administrator is usually not called upon to do work of this kind, is the fact that this is virtually a receivership plus administration. The administrator was running a large newspaper enterprise, with about sixty employees directly under him, and with about twenty branch offices. As administrator, his only duty would have been to try and sell the plant and other property which belonged to the decedent. By his successful management, however, he has so handled the business that \$30,000 of decedent's debts have been paid off, and no new debts have been incurred. Other extraordinary duties which the administrator has performed in this instance, are those of selling the real property which belonged to the decedent, and of taking many trips to different cities where branch offices were located. It would thus seem clear that services were rendered which were extraordinary services for an administrator, and as such he should be compensated therefor.

1914.]

Estate of Kohanyi.

Some of these difficulties, and the court's estimate of their worth, are as follows:

Prompt payment of current expenses every month, saving \$100 a month.....	\$ 50.
Arranging for the extension of \$50,000 debts due the decedent, and letters.....	200.
Sale of the Kohanyi homestead.....	100.
Case of Louis Klosz v. Administrator.....	50.
Great amount of administrator's time taken in sett- ling controversies between heirs, and attend- ance at court by reason of such controversies..	200.
Installation of new business system, looking after many repairs and improvements, and overhaul- ing plant generally.....	400.
Maintaining harmony among employees.....	200.
Warding off libel suits.....	100.
Watching accounts receivable so that they are promptly collected.....	100.
Total	\$1,400.

As for the results obtained, \$180,506.75 has been realized from the enterprise. All current expenses have been paid, old debts amounting to \$30,000 have been paid, and partial distribution has been made to the extent of \$6,200; and in addition, a spirit of confidence and enthusiasm has been injected into the enterprise, and for all this the administrator asks a little less than three per cent. of the total gross receipts, as compensation. The court thinks that under the showing here made, he is entitled to it, and the motion asking for such allowance is hereby granted.

The motion for attorney's fees was filed at the same time as the account, and asks for a total of \$1,560. Accompanying this application is an itemized statement of the work done by the attorneys. Since the hearing, extensions have been made opposite each item, and these, according to my figures, total, \$1,597. Only \$1,560 is asked for. I have looked over every one of these items,

and find that it was all work which was done in the interests of the estate, and the amounts charged are all reasonable. While objections were raised to the payment of these fees, no specific item was attacked as being improper or excessive. The sum of Dobay's objection seems to be that no attorney's fees should be allowed because the administrator himself is a lawyer. While this is true, it does not follow that the administrator would necessarily have to act as his own lawyer because he is one. It is sometimes unwise for a man to act as his own attorney, and it is at all times proper, and sometimes necessary, to call for the assistance of an attorney, where the administrator is situated as this administrator was. No valid reason has been pointed out, and the court can see none, why the amount asked for should not be allowed, and the application to pay these attorney's fees is therefore granted.

The order of the court therefore is, that all the exceptions to this account are overruled, and the application for attorney's fees and extra compensation are granted in the amounts asked for, and the account is approved and ordered recorded.

1914.]

Stern v. Columbus.

VALIDITY OF VEHICLE LICENSE ORDINANCES.

Common Pleas Court of Franklin County.

JACOB STERN ET AL V. CITY OF COLUMBUS ET AL.

Decided, March, 1914.

Municipal Corporations—Application of the Marmet Case to Fees Imposed by a Municipal Legislature—Vehicle License Ordinance Not a General Revenue Measure, When—Application of the Surplus Received for Licenses.

1. In an action involving the validity of an ordinance, the defense of *res adjudicata* is not available where based on the claim that a former ordinance on the same subject was held constitutional, notwithstanding the general similarity of the present ordinance to the old one is admitted.
2. A vehicle license ordinance will not be classified as a general revenue measure, and therefore invalid, because of the fact that the receipts greatly exceed the expense of collection, where it appears that the surplus is turned into the fund for repair of the streets.

Webber, McCoy & Jones, for plaintiffs.

City Solicitor, contra.

EVANS, J.

The question submitted involves the validity of the ordinance passed November 10th, 1913, and an amendment thereof passed December 22d, 1913, known as the vehicle license ordinance.

It is claimed by petitioners that said ordinance is invalid and contrary to the Constitution of Ohio, because first, it is a tax, a revenue measure in the guise of a license; second, that it discriminates, and third, that it is not uniform in operation.

The case is submitted on motion of plaintiffs for a temporary injunction, on the petition, answer, agreed statement of facts and the briefs of counsel.

The second defense of *res adjudicata* does not apply here as a defense. The reasoning assigned is sound in a case involving the same ordinance, but as this is a new ordinance, although substantially the same as the old, the doctrine of *res adjudicata* should not apply as a defense to the new ordinance.

Inasmuch as the petition could be amended, if such was necessary to cure the defect claimed, I will regard such as though the amendment was made, and will determine the question here made on the merits.

Has the city council usurped its lawful powers and enacted a taxing measure in the guise of a license?

The facts show that in the year 1913, the necessary expenses for clerical service, blanks, tags and numbers for licenses was about \$2,000. That the income received by the city for 1913 for licenses under said ordinance was about \$20,000.

It is claimed that the income is so greatly in excess of the necessary expenses that it amounts to a tax, and that the income so in excess of the expenses establishes the intent of council to enact a revenue *measure*, for the doing of which no legislative authority is delegated to a city council.

Under Section 3632, General Code, the Legislature granted to municipal corporations power to license and regulate the use of streets by persons who use vehicles or solicit or transact business thereon.

Under said power so delegated by said legislative act to municipal corporations, it is conceded that a municipal corporation may by ordinance of its council exact and collect license fees from persons who use the streets of the city for the use of vehicles. But the claim of plaintiffs is that the fees exacted and collected can not exceed the necessary expenses of enforcing the ordinance and collecting the fees. It is also claimed that an income in excess thereof is invalid, because it is a tax, and that no power is conferred or delegated by the General Assembly to a municipal corporation to create and enforce a taxing measure.

Ordinances substantially the same as the one here in question have been upheld by the courts of this jurisdiction, notably, *Linton v. Columbus*, 5 N.P.(N.S.), 436, affirmed in 10 C.C.(N.S.), 199, and other cases cited in the briefs of counsel. These decisions are largely predicated upon the holding in *Marmet v. State*, reported in 45 O. S., 63.

It is contended by counsel for plaintiffs that *Marmet v. State*, and other cases cited involving the validity of legislative acts,

1914.]

Stern v. Columbus.

are not authorities, and should not control in the determination of the validity of ordinances of municipal corporations for the reason that the General Assembly has by the organic law power to enact taxing measures, while a municipal corporation has no such power, and that the Legislature has delegated no such power to municipal corporations.

It is, therefore, contended that the holding in *Marmet v. State* has no application, and should not have controlled in the determination of the question of the validity of the vehicle license ordinances.

There is no doubt as to the soundness of the doctrine that the power of taxation is a sovereign power and can only be exercised by the General Assembly when and as conferred by the Constitution of the state, and can only be exercised by municipal corporations only when unequivocally delegated to them by the legislative body.

This is the doctrine held in *Mays v. Cincinnati*, 1 O. S., 268, and there is no question but that such continues to be controlling rule of law.

It then being the undoubted rule of law that municipal corporations have no taxing power other than such as may be delegated by the General Assembly; and that the Legislature has not delegated to municipal corporations the power to tax or raise revenue by income from fees exacted and collected from persons who use vehicles on the streets by an ordinance such as we have here under consideration, the question arises, in view of the said former decisions of the courts, why did those courts regard and apply the *Marmet* and similar cases as authority in determining the validity of ordinances of city councils? There is no question under the law that if said ordinance is in fact a taxing measure, it is an unconstitutional measure, and is void. And there is no doubt, if the legislative power delegated to the municipal corporation is limited to the actual necessary expenses of enforcing the ordinances and collecting the fees, and an income in excess thereof is prohibitive, then this ordinance is unconstitutional and void.

Is the ordinance a tax, or is it not?

The ordinance provides fees ranging from \$1.50 for certain one horse vehicles to \$10 for vehicles drawn by more than four horses.

Section 10 provides, "that the money paid into the city treasury from said license fees shall be credited to a fund to be known as 'the vehicle fund,' and shall be first applied to the expenses of issuing said licenses and furnishing said numbers and tags, and then, if any remain, shall be used only for the actual repair of the streets of the city of Columbus, Ohio."

I am clearly convinced that the Legislature did by Section 3632, General Code, delegate power to municipal corporations to exact and collect license fees from persons so using the streets. If this is sound, and I think it is not here controverted, then it necessarily follows that the Legislature has thereby conferred discretion to a city council to fix and determine the amount of the fee. If this discretion is not abused, and if council does not create a tax in the guise of a license to regulate, in my opinion the courts could not invalidate the ordinance.

It must be borne in mind that the General Assembly itself has no power to enact a revenue measure, which is a tax, in the guise of a legislative act to regulate by license. And when the Legislature does so its act is unconstitutional, and the act void on the same reasoning that a taxing ordinance would be void. *Janes v. Graves*, 15 N.P.(N.S.), 193, cites abundant authorities on this proposition.

Yet, in many cases the courts uphold legislative acts to regulate by license where the facts show that the income therefrom is greatly in excess of the expenses.

See cases cited in *Janes v. Graves*, and in *Castle v. Mason*.

Such is legislative discretion, where it appears that the legislative intent was to create a tax, or the income is so excessive as to raise that presumption, such act is held to be invalid.

The test generally applied is whether the revenue is intended to be, and is, used for other and general purposes in a legal sense. If so, it is a tax, and neither a municipal corporation, nor the Legislature in a license measure for regulation has power so to do. The latter has power to tax for general purposes, but not in the guise of a license.

1914.]

Stern v. Columbus.

The ordinance in question provides that the said license fees shall be paid into the city treasury and credited to "the vehicle fund," and if any money remains after paying expenses of issuing the licenses and furnishing the numbers and tags, it shall be used only for the actual repair of the streets.

There is then nothing in the ordinance that shows any intent to apply the money for any purpose other than for said expenses and the repair of streets used by the vehicles if there is any surplus money so collected.

If there is some discretion delegated by said legislative act, in the fixing of fees for licenses, it must be regarded as a reasonable discretion. It is stipulated here that the city expended some \$85,000 in the year 1913 for the care and repair of the streets of the city, and that the use of vehicles mentioned and described in said ordinance in the streets of the city tend to wear out said streets and necessitates care and repair thereof.

It is my opinion that the city did not exercise an unreasonable discretion in providing such fees as would produce an income to, at least, partly reimburse the city for the expense of repairing the streets from wear, caused by such vehicles.

And I am of the opinion that a fair consideration of the *Mar-met* and other similar cases justifies a conviction that the doctrine there held is applicable to city ordinances as well as to legislative acts, because the Legislature has delegated a reasonable discretion upon municipal corporations to exact and collect fees, and that it can not well be said that if there is an excess amount beyond the actual expense of enforcing the ordinance, and for blanks, tags and numbers, that its application to help pay expense of repairs of the streets caused by the wear thereon by such vehicles, is an abuse of such discretion.

I am of the opinion that said ordinances are not invalid upon any of the grounds claimed in the petition, and that such is not a tax. On the other hand, I am of the opinion that such are valid and constitutional ordinances. By this I do not intend to hold that No. 11 in Ordinance No. 27776, passed December 22d, 1913, providing for license fees for motor-cycles or auto-cycles, is within the power of council to enact, for the reason as I

understand that such are now licensed by the state by a recent enactment of the Legislature, but this exception does not invalidate all other provisions of said ordinance. For above reasons, the motion for a temporary injunction is overruled.

UNLAWFUL OCCUPATION OF SIDEWALK WITH GOODS AND WARES.

Common Pleas Court of Clark County.

GUS M. SALZER & BROTHERS V. BOWLUS-HACKETT FRUIT CO. ET AL.

Decided, March, 1914.

Municipal Corporations—Occupation of Part of Sidewalk for Exhibition of Merchandise and Wares—Whether Unlawfully Authorized by Ordinance a Question of Fact Determinable by Judicial Inquiry—Ordinance Invalid if Such Occupancy Interferes with Public Use—Easement of Abutter—Injunction—Section 3714.

1. By the provisions of Section 3714, General Code, the council of a municipal corporation is empowered to supervise and control the public highways, streets and sidewalks of the corporation, but such power must be exercised so as not to seriously impair the use of said highways, streets and sidewalks by the public for travel and transportation of property, or seriously to interfere with the enjoyment by the owners of property abutting on such highway, street or sidewalk of such rightful easement in the same in relation to his property as they may have, and whether such power of the municipal corporation is wrongfully exercised in any case is a question of fact to be determined in a judicial inquiry by the particular circumstances of the case.
2. Where an ordinance of a municipal corporation in terms authorizes the owner or occupant of any store or premises abutting on a sidewalk to occupy for the purpose of exhibiting his wares or merchandise three feet of the sidewalk in front of said store or premises, which space to be so occupied shall be immediately adjoining the line of said premises, such use is not made lawful by the ordinance if such occupancy of the sidewalk materially interferes with its use by the public or with special easements of the owners of property abutting thereon.
3. If such occupancy of the sidewalk is unlawful it will be enjoined in an action brought by the owner of such special easement, upon his showing that he sustains special injury in the premises.

1914.]

Salzer v. Bolus-Hackett Co.

Chase Stewart, for plaintiff.*John M. Cole*, contra.

HAGAN, J.

Demurrer to plaintiff's reply.

This action was commenced March 25, 1912, by the filing of a petition by the plaintiffs, alleging, in substance, that the plaintiffs occupy storerooms and basement of the Constantine Building, located on the southeast corner of High and Center streets, in the city of Springfield, Ohio, and conduct a large and profitable business on said premises in retailing furniture and kindred lines and clothing, the property abutting eighty-five feet on the south property line of the public sidewalk of West High street, and the two main entrances to the said premises being located thereon; that said entrances are constantly and necessarily used in plaintiff's business, by its employees, customers and the general public, all of whom, for the purpose of access to and egress from said premises, constantly employ and traverse the said south sidewalk of West High street from Fountain avenue to the plaintiff's premises; that the defendants, William A. Evans & Company and the Bowlus-Hackett Fruit Company, severally occupy the premises abutting respectively thirty feet and fifty feet on said south sidewalk; that both of said defendant firms are wholesale fruit and vegetable commission merchants, and use their respective premises for buying, selling, storing, displaying, receiving, loading and unloading large quantities of fruits, etc., and are and have been wrongfully, unlawfully and unnecessarily obstructing and encroaching upon the sidewalk in front of their respective premises by placing on all portions thereof large boxes, crates, etc., and thereby encumbering and blockading said sidewalk, both by piling such obstructions against their buildings to the width of from four to six feet and more therefrom, as well as by unloading same upon said sidewalk along the curbing; that defendants allow such obstructions to remain upon said sidewalk for entire days, and keep said sidewalk covered with such obstructions for the purpose of displaying their goods to their trade, and thereby create and maintain such obstructions as a nui-

sance to the injury and annoyance of the public, and all persons desirous of using and traversing said sidewalk; that in consequence of the defendants' said acts it has been either difficult or impossible for any persons to pass over said sidewalk in either direction, and persons desirous to travel along the same have been prevented thereby, and have been compelled either to divert their way out into the roadway of the street, or to walk along the north side thereof or to travel along some other street of said city; that in addition to the public inconvenience, annoyance and injury therefrom resulting plaintiff has been especially injured, in that its agents, employees, customers, visitors and prospective customers have been constantly prevented and hindered from using said south sidewalk as a means of approaching and leaving its store; that many customers and prospective customers have lessened their visits to said store on account of said obstructions, and many have ceased to deal with the plaintiff, and plaintiff has lost the trade of a large part which formerly came from passers-by, who were attracted to plaintiff's display windows, by all of which facts the value of plaintiff's leasehold has been greatly injured and impaired, and plaintiff's location for the retail furniture and clothing business has greatly decreased in value, to the material injury of the good will of plaintiff's business.

The petition further avers that the defendants threaten to and unless restrained by the court will continue to unlawfully encroach upon said sidewalk and maintain said nuisance, and the damages resulting to plaintiff therefrom will be irreparable, and plaintiff is without adequate remedy at law.

A temporary injunction is prayed for, and that it be made permanent.

To this petition the defendants filed their separate answers. The answers are substantially alike—each sets forth a first defense, specially denying that the defendant has unlawfully, wrongfully, unreasonably and unnecessarily obstructed and encroached upon the public sidewalk in front of its premises, in the manner or form alleged in the petition, and denies all other allegations of the petition.

The second defense of the answer says that by virtue of Section 278 of the general ordinances of the city of Springfield, Ohio, it is provided that any owner or occupant of any store or premises may occupy, for the purpose of exhibiting his wares or merchandise, three feet in width of the sidewalk in front of such store or premises, which shall be immediately adjoining the line of said premises; that under the provisions of said ordinance the defendant has, at the time mentioned in the petition, occupied said three feet in width of the sidewalk in front of its premises for the purpose of exhibiting its wares and merchandise; that as to other portions of said sidewalk in front of said premises the defendant doing, as it does, a large business as a wholesale commission and produce merchant, in the careful and reasonable use of said sidewalk in front of its said place of business occupied and used the same at the time mentioned in the petition, only for the purpose of delivering and discharging freight, and for the purpose of receiving and shipping goods, and in that manner necessarily, reasonably and lawfully obstructed such other portions of the said sidewalk by its said freight and goods.

The application for a temporary restraining order was submitted to my predecessor, Judge Kunkle, on affidavits and the separate answers of the defendants, and upon consideration thereof he granted a temporary restraining order December 28, 1912, pending the final hearing of the case, whereby the defendants, their agents, servants and employees were enjoined to refrain from unnecessarily or unreasonably obstructing that portion of the sidewalk which is comprised outside of the line thereon of three feet next adjoining the premises of defendants abutting upon said sidewalk by its or their goods, wares, and merchandise, and from unnecessarily or unreasonably hindering or preventing plaintiffs, their employees, servants or customers, from having the convenient use of their said premises.

Plaintiff has filed a reply to the second defense of said answers, by which reply plaintiff admits the existence and provisions of said ordinance, as alleged in the answers, but avers that said ordinance is invalid, void and of no effect, because

said provision in question was enacted without authority of law, the same tending to prevent the sidewalks of said city being kept open, and free from nuisance.

The defendants demur to this reply of the plaintiffs, alleging the invalidity of said ordinance, and the case is submitted to the court upon said demurrer and the briefs of counsel.

Section 3714, General Code, reads as follows:

“Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the corporation, and shall cause them to be kept open, in repair, and free from nuisance.”

Section 278 of the general ordinances of the city of Springfield, Ohio, provides as follows:

“It shall be unlawful for any person to place or deposit, on the public highways, streets, avenues, alleys, sidewalks, or public grounds, any wood, coal, box, barrel, crate, cask, keg, casting, lumber, goods, wares, furniture, merchandise, or any other material or obstruction whatsoever; unless for such reasonable time as may be actually necessary for receiving or discharging the same from some store, building or other place, and in such event the same shall be so placed as not to block the street, alley, sidewalk, public highway or public ground upon which the same is so placed or to interfere with the free passage of water in the gutters of such street, alley or public highway; provided, that the provisions of this section shall not apply in such cases as are now or may hereafter be authorized by ordinance or resolution of council or by resolution of the board of public service, and provided further, that any owner or occupant of any store or premises may occupy for the purpose of exhibiting his wares or merchandise three feet in width of the sidewalk in front of such store or premises which shall be immediately adjoining the line of said premises.”

Under said statutory law and ordinance, what rights, if any, are conferred upon either of the defendants to use three feet of the sidewalk next to the line of its premises for the display of its articles of merchandise?

Public streets were originally designed for public travel and transportation of persons and property by means of carriages, wagons or beasts of burden. Public streets, however, have, in the progress of civilization, been subjected on their surface, above their surface, or under their surface, to many other uses of a public nature, such as street railways, wires, pipes and other appliances, for gas, electricity, telephones, telegraph lines, water and sewerage, any and all of which uses may be carried on either by the municipality or by private enterprise. All such uses are authorized by municipalities under the provisions of state law. When a municipality grants a franchise for such a use to operate for a specified term of years, a contract thus arises between the grantor and the grantee, and the contract is inviolable during the term of its life, or as long as the grantee observes the conditions of the grant. All the people have the right to use the public highways under such reasonable regulations as may be provided by the municipality.

The owner of abutting property on a street, in addition to his right to enjoy the same in common with all other members of the public, has special interests in the right of access to the property from the street, and to the street from the property, by passing over the same or transporting his goods or other portable articles to and from his property. He also has the right to use a portion of the street and to use the sidewalk for the purpose of transporting materials to his premises for building or repairing structures thereon. He also has the right to receive light and air for the enjoyment of his premises from the street, without obstruction. The easement which he has for such purpose is as much property as the soil itself which constitutes his lot. He does not derive it from the Legislature or the municipality, and neither can take it away from him without just compensation. *Clark v. Fry*, 8 Ohio St., 358; *Columbus v. Penrod*, 73 Ohio St., 209.

In the enjoyment of this easement, however, he may be subjected by the municipality to such regulations as that he may not use it unreasonably, so as to materially obstruct the use of the street, including the sidewalk, by the public generally, or by the owners of abutting property adjoining his own.

The municipality may license other uses of the street proper or the sidewalk by owners of the abutting property which do not materially interfere with its use by the public or such easement of the owners of other abutting property, in which case it must give way to such rights of the public to access, light, air, etc., already described. *C., C., C. & St. L. Ry. v. Provision Co.*, 9 N.P.(N.S.), 572; *Elster v. Springfield*, 49 Ohio St., 82.

License by the municipality for any such private use or its mere silent permission or acquiescence does not create a right, but merely a privilege revocable by the municipality at any time, and existing by its mere licensed permission or acquiescence, and moreover where the municipality does not revoke such a grant, or where such a use exists merely by its silent permission or acquiescence, if it works a special injury to the owner of abutting property which is not common to him and other members of the public, he may have relief against the thing complained of on the ground that it is a nuisance.

A license by the city of Cincinnati to an owner of abutting property to construct and maintain a bridge across the street where it did not interfere with travel by the public, or with the light and air of any owner of property abutting upon the street was upheld by the Supreme Court of Ohio. *Kellogg v. Traction Co.*, 80 Ohio St., 331.

The court, at page 347, approved the case of *Cincinnati v. Fleischer*, 63 Ohio St., 229, upholding the right of an owner of abutting property to maintain a carriage block on the sidewalk, of the usual size and occupying the usual position of such blocks near the curb upon the street, where the city had merely permitted it to be in the street, without expressly authorizing it. The court in *Kellogg v. Traction Co.*, *supra*, at page 348 said:

“The immemorial practice has been for the abutter to maintain in the street shade trees, carriage blocks, hitching posts, lamp posts, areas, cellarways, coal cellars or holes, steps, stairways, fire escapes, porticos, bay windows, awnings, signs and other conveniences, and to place his building flush with the street so that the eaves project over the street and his window shutters open over the sidewalk.”

At page 349, however, the court said that the public must not be inconvenienced by any such private use of any part of the street. The only possible exception to the rule that such private use of a street must depend upon the silent permission or acquiescence of, or a license by the municipality, is where the use is so far above the surface or so far beneath it that it can never interfere with any legitimate public use of the street, or the easements of the owner of abutting property—as, for instance, where a line is strung for an electric current eighty feet above the surface of the street. *Henry v. Cincinnati*, 1 C.C.(N.S.), 289.

With the limitation thus approved, and with the further limitation already pointed out by the court as to the right of the owner of abutting property to have access to the same, the use of the sidewalk for building or repairing structures on his property, and the enjoyment of light and air from the street for his property, all merely private uses of the roadway of the street, or of its sidewalk, may be prohibited by the municipality. The right of a city to authorize the columns of a building to be extended for ornamental purposes twenty-four inches over the sidewalk from the line of the building, where it did not interfere with public travel, has been sustained. *Sautter v. Bank*, 45 Misc., 15.

On the other hand, an iron stairway extending over five feet onto a sidewalk was enjoined at the instance of the owner of abutting property, as an obstruction to public travel, and therefore a nuisance. *Pettis v. Johnson*, 56 Ind., 139.

On the examination of a large number of authorities in Ohio, and in other states, the court is of the opinion that no private use of a sidewalk, or a street, can be rightfully enjoyed, whether the same is expressly authorized by a municipality, or merely permitted or acquiesced in by it, to the injury of the owner of abutting property on the street, or where such private use in any way materially interferes with any legitimate use of the street or sidewalk by the public.

This rule is stated in the case of *Branahan v. Hotel Co.*, 39 Ohio St., 333, which was a case brought to enjoin the use of part of a street for a hack stand. At page 344 the court said:

"The city is clothed with power over the streets, and is charged with the duty of keeping them open for public use and free from nuisance. It may enlarge these general public uses without infringing the rights of the adjacent owner, but where additional burdens are imposed even for a mere public purpose, which materially impair the incidental property right of the lot owner, equity will enjoin until compensation is made. This ordinance granted a permanent use of the street for private uses. As well might the city authorize permanent booths or structures for the use of dealers in the various articles of trade. Having no rent to pay, the occupants could accommodate the public at better rates. The supervision and control of the public highways of a city is a public trust, and while additional uses may be imposed, not subversive of, or impairing the original use, such as laying down gas and water mains; yet the rights of the public to use it as a street, and of the adjacent lot owner to enjoy it as the means of access to his property, can not be materially impaired."

The general doctrine is well stated in the case of *Snyder v. Mt. Pulaski*, 176 Ill., 397.

A very full discussion of the subject by the Supreme Court of the state of Iowa is found in a decision rendered in 1909, *Lacy v. Oskaloosa*, 143 Iowa, 704.

A case directly in point is that of *Pcople v. Willis*, 9 App. Div., 214, the syllabus being:

"The common council of the city of Brooklyn is not authorized to permit the use of the sidewalk for displaying goods, by the provision of the charter that it may regulate all matters connected with the public wharves, and all business conducted thereon and with all parks, places and streets of the city."

The rule is perhaps broader than the lines of authorities we have been examining, but certainly it is good authority for the proposition that such a license would not protect the licensee if the use thereby granted would interfere materially with the use of the street by the public, or with any of the easements of the owner of abutting property.

There is also an interesting case, that of *Pagames v. Chicago*, 111 Ill. App., 590, decided in the year 1904, where there was an ordinance in tenor very much like the one here in question,

authorizing the occupancy of three feet next to the building for the display of clothing, goods, wares, merchandise, etc. The court said:

“If this ordinance may be construed to allow the licensees to conduct their business upon the streets or sidewalks so as to cause a substantial and permanent obstruction to public travel thereon and thereover, then it is clearly void and there can be no rights thereunder.”

A very exhaustive case on the general rule, to which we have referred, and where the right of one who was specially injured by a nuisance growing out of the use of the street for private purposes was invalid, is that of *Townsend v. Epstein*, 93 Md., 537.

Authorities of the same tenor as those cited might be indefinitely multiplied, and it appears to the court that the rule to be deduced from the general trend of authorities is that while private uses of a street, including the sidewalk, and affecting the surface, the super-surface or sub-surface of a street, may be authorized by the municipality, or silently permitted or acquiesced in, to the extent that such uses do not materially interfere with the rights of the travelling public to use the street proper, or the sidewalk, or with the special easements which the owners of abutting property may have in relation to the street that whatever the form of the express authority may be, whether that of a resolution or of an ordinance, it is in effect a mere license revocable by the municipality, and as in the case of silent permission or acquiescence, to be enjoyed only in subordination to the general, legitimate uses of the street already described. As between the municipality and the licensee, so long as silent permission or acquiescence therein obtains, it may exempt the user from any penalty which the corporation may seek to impose upon him for a particular use of the street, but if such use, either at its commencement or subsequently, is such as to materially interfere with the easement of the owner of abutting property, to his special injury, the fact that the use is authorized by an ordinance, or such silent permission or acquiescence, interposes no bar to relief for such property owner from the nuisance by injunction.

It may well be said that such a use of the sidewalk, in many instances, as is provided for by the ordinance in question, viz: the use of three feet of the sidewalk next to the property line for the display of goods, would not materially interfere either with the public use of the sidewalk or with the special easements of the owner of any abutting property.

For instance, in a part of the city where there is comparatively little travel along a wide sidewalk, the use by a grocer of such space to display his wares would not materially interfere with pedestrians passing along the walk, or with the easements of other abutting property owners.

On the other hand, in a part of the city where pedestrians crowd the sidewalks day by day, such use of the sidewalk might materially interfere with their passage over the pavement, and thus injuriously affect owners of other abutting property in the manner alleged in the petition.

It is not necessary to hold said ordinance invalid in order to afford relief to a party seeking it, but simply that the use which it licenses has become inconsistent with the exercise of the rights of the plaintiff.

In other words, it appears to the court that it is a question of fact in every instance, which is to be considered to determine whether the particular use complained of is specially injurious to the complainant.

Whether the plaintiff in this case has been specially injured in the respects, or any of the respects claimed in the petition, by reason of the alleged use of three feet of the sidewalk next to the premises of either of the defendants, must be determined by the effect such use has in consideration of all the circumstances upon the easement of the plaintiff, claimed by him, as to his own property, to enjoy the use of the sidewalk in front of the premises of the defendants as a way for his customers and employees to have access to the premises of the plaintiff.

The court having this view of the case, the demurrer will be overruled.

1914.]

Auto Service Co. v. Cincinnati.

SPECIFICATIONS FOR PUBLIC CONTRACTS.

Superior Court of Cincinnati.

FISCHER AUTO & SERVICE COMPANY V. THE CITY OF
CINCINNATI ET AL.

Decided, August 24, 1914.

Municipal Corporations—Specifications Upon Which Bids Are Asked—Must Permit of Competition in a Practical Way—Purchase of an Automobile Enjoined—Where Specifications Made Impracticable Bids from More than One Company.

1. The provisions contained in Sections 3811, 4328 and 4371, relating to specifications for and the letting of public contracts by municipalities require that the specifications upon which bids are invited shall permit of general compensation in the practical and commercial sense.
2. The carrying out of a contract for the purchase of an automobile for municipal use will be enjoined where the specifications are so drawn as to prevent compliance therewith except by one concern, unless compliance is attained by the purchase and assembling of automobile parts from different factories and the production in that manner of an unknown machine at a cost possibly prohibitive.

Bettinger, Schmitt & Kreis, for plaintiff.

Saul Zielonka, Assistant City Solicitor, contra.

MERRELL, J.

In this action the plaintiff, as tax-payer, seeks to enjoin the director of public service of the city of Cincinnati from carrying out a certain contract made by the city with the Welbon Motor Car Company for the purchase of an automobile, and to enjoin the city auditor from issuing a voucher, and the city treasurer from honoring such voucher in payment for said automobile.

The plaintiff alleges and the defendants admit that the city solicitor was requested in writing to bring this action and refused so to do.

The contract is attacked on the ground that the specifications for the automobile, intended for the use of the chief of police, contemplated an expenditure of more than \$500, but were so framed as to prevent competitive bidding; that the specifications were identical with those contained in the catalogue of the Hudson Motor Car Company, and that no make of car other than the Hudson could comply in all respects with said specifications.

It is also alleged that three bids were received, one from the Welbon Company for a Hudson car, one from the Leyman-Buick Company, handling the Buick car, for a machine of that make, and one from the plaintiff company, local dealers, for the Chalmers car.

It is further claimed that the bidders other than plaintiff are controlled through stock ownership by the same persons, and that the bid of the Leyman-Buick Company was for the purpose of giving the appearance of competition, although in truth the Buick car could not compete with the specifications.

The specifications are in evidence, a few of the many details being as follows: motor, 6 cylinder, 40 H. P., water cooled; cylinders, $3\frac{1}{2} \times 5$; wheel base, 123 to 130 inches; clutch, multiple disc; weight, not to exceed 3000 pounds.

The testimony dealt largely with the specifications of numerous makes of automobiles which are purchaseable in this country, of a type that might be considered as in any degree approximating the specifications of the city.

It was made to appear beyond any doubt that no known make of automobile, except the Hudson, came within the city requirements. Measured by the city specifications, every other machine was disqualified by reason of overweight, or of having a cone clutch, or a wheel base less than 123 inches, or cylinders of a different dimension from that specified, or by a similar departure in some radical particular from the specifications.

The situation thus disclosed was not, and doubtless could not be, seriously denied by counsel for defendants, in whose behalf the position was taken, first, that automobiles of numerous makes could be changed in some one or more particulars in order to

meet the city's specifications; and, second, that all of the parts specified being purchasable on the open market, any one familiar with automobile construction could "assemble" a machine to meet these specifications.

In view of the uncontradicted evidence in the case, neither of the contentions is of compelling force. Upon the evidence the conclusion is not to be avoided, that in practically every case of a make of automobile suggested as a possible competitor under these specifications, the changes required would be such that, if mechanically possible, they would be commercially impracticable. That is to say, the changes required would necessitate an expense which would practically prohibit competition, or if made, would produce an unbalanced and amorphous machine which would be unworthy of serious consideration.

On the other hand, the theory that these specifications open the way to competition by automobiles produced by assembling parts, is one that will doubtless appeal more to minds technically inclined, than to those versed in mechanics and in the automobile industry. Judges, even when not aided by evidence, can not remain oblivious to knowledge which is widely current outside the court room.

Upon the evidence presented, and possibly in the absence of part of such evidence, it is sufficiently clear that competition in the commercial and practical sense would not be and could not be produced under the specifications here in question, by offers to assemble automobile parts so as to bring forth hitherto unknown and unnamed machines conforming to the specifications of the city of Cincinnati. Particularly is this so when under those specifications it is sought to purchase but a single automobile.

There was indeed testimony, the truth of which need not be questioned, that it is possible to purchase upon the open market the several parts of a machine and to assemble these parts into an entire car. There was no testimony, however, to the effect that the process last described could be so pursued that a single machine so constructed to meet the specifications in this

instance, could also meet the competition of a machine of like specifications built in large numbers by a highly organized and specially equipped plant engaged in this business alone.

Manifestly the answer to the theory of possible competition by assembled cars, is that the city of Cincinnati, by asking for bids in this instance, sought to purchase an automobile, and not merely an aggregation of automobile parts.

It is, however, contended that actual competition was shown in this case by the presentation of an offer by the Leyman-Buick Company to furnish a Buick car "in accordance with the specifications." This bid, however, is accompanied by printed descriptions of the Buick machine, apparently as part of the bid itself. These printed descriptions disclose that the machine, obviously that offered for acceptance, does not conform, in important particulars, to the city's specifications. It was not competent, therefore, for the director of public safety to accept the Buick offer, which consequently fails entirely to establish competition in fact.

For the reasons last stated, it becomes unnecessary to consider in detail the plaintiff's allegation that the companies offering respectively the Hudson and the Buick cars were subject to a common control through stock ownership.

It was, however, established that the same persons were large stockholders in both companies and that both corporations had the same president. If on other grounds this case was a close one, the circumstances disclosed would compel the closest scrutiny.

For the same reason, I omit any extended reference to the manner in which the specifications were prepared. It appeared that the draftsman had before him the city's former automobile specifications, under which a Peerless car was purchased about a year ago, and if, if I correctly recall his testimony, the catalogue of the Hudson and Buick concerns. The evidence on this score is not regarded as of controlling significance.

Two cases in Ohio were chiefly relied on by counsel for the City:

1914.]

Auto Service Co. v. Cincinnati.

State, ex rel Dolle, v. Miller, 10 C.C.(N.S.), 406: In this case it was sought to enjoin the letting of a contract for a street improvement with wood block, for the reason that the specifications therefor provided that the wood block should be treated with pure coal tar creosote. It was claimed by the relator in that case that the preservative was a substance patented and controlled by a single company. Upon the evidence the circuit court found that the use of the preservative specified was not covered by patent right and that the same was obtainable on the open market. Upon the finding of facts in that case, the decision of the court logically followed, and an injunction was refused. The case, however, is not analogous to the case at bar, for the reason that in the latter there is no denial that the several parts of an automobile are purchasable on the open market in a form to comply with the specifications. The gist of the present complaint is that no automobile, *as a complete and integral structure*, can be offered for competition under these specifications other than the car of the successful bidder. A further distinction that may be pointed out is that in the wood block case the specifications call for a commodity which ordinarily is, and in that instance obviously was expected to be, manufactured for the particular occasion. In the present case, the court can not lose sight of the fact, made apparent at the trial, that a single automobile is not in the trade manufactured to comply with a peculiar and isolated specification. An analysis of the facts in the wood block case and in the present case suggests again the vital distinction between competition only theoretically possible as distinguished from real competition in the practical and commercial sense.

McCourt v. Akron, 13 N.P.(N.S.), 537: In this case, again, the letting of a contract for a public improvement was sought to be enjoined, for the reason that the board of control secretly, so it was charged, determined in advance of receiving bids that they would use lock bar steel pipe, which it is further alleged was exclusively manufactured and controlled by one concern. From the report of the case it would appear that the specifica-

tions did not call for this particular type of pipe, nor did the advertisement for bids. It is plain, therefore, that intending bidders were not limited in their offers of pipe to a kind closely controlled by patent or exclusive manufacture. The court, therefore, properly held that it would not control the honest discretion of public officials having the award of this contract. That the authority of this case hardly extends to the facts of the present case may be gathered from what is said by the court at page 543:

"Many of the allegations of the petition fall to the ground when, as the evidence shows, the bid of the successful bidder was not for steel riveted pipe, but was 'for furnishing and laying 36 inch steel pipe one-fourth inch thick.' The advertisement for bids was for steel pipe delivered and laid complete."

In *Holbrook v. Toledo*, 8 N.P.(N.S.), 31, following *Hastings v. Columbus*, 42 O. S., 585, it was held that competitive bidding is not necessarily narrowed by admission to competition of material which is monopolized by reason of patents.

That these decisions, doubtless well considered, were not in accord with the legislative intent underlying the statutory provisions requiring competitive bidding, may be inferred from the passage of the act which is now contained in Section 3811 of the General Code, as follows:

"No municipal corporation shall adopt plans or specifications for a public improvement required by law to be made by contract let after competitive bidding, which requires the exclusive use of a patented article or process, protected by a trademark, or an article or process wholly controlled by any person, firm or corporation or combination thereof."

While it may be doubted if the term "public improvement" is sufficiently broad to cover the purchase by a municipality of an automobile, yet the statute quoted may be taken in the light of an expression of the public policy of the state, and therefore argumentatively applicable in the construction of Code, Section 4328, in part as follows:

1914.]

Auto Service Co. v. Cincinnati.

“When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditures shall first be authorized and directed by council. When so authorized and directed, the director of public service (and, by Section 4371, the director of public safety) shall make a written contract with the lowest and best bidder, after advertisement for not less than two or more than four consecutive weeks in a newspaper of general circulation within the city.”

In the present case the true test is whether the statute last quoted is satisfied, if specifications upon which bids are invited permit theoretical competition merely, or if the possibility of general competition in a commercial sense is a *sine qua non* in the letting of public contracts.

The latter construction must be adopted if the statute law of this state governing public contracts is to be more than a dead letter. Subjected to this test, the specifications here in question, although open in form, are in truth closed to all except those who have a single make of automobile to offer.

Upon the evidence presented, I am unable to find in these specifications a genuine compliance with that municipal law which opens all public contracts of a certain kind and amount to competition, with a view to securing to the public that which is at once the cheapest and the best.

In *Tucker v. City of Newark*, 19 C. C., 1, it was held that specifications for a street improvement which called for the use of brick of a particular manufacture, did not permit of competition within the spirit and meaning of the statute.

A case which was not cited in argument, but the authority of which is extremely persuasive when applied to the facts in the case at bar, is that of *Grace v. Fobes, Mayor*, 118 N. Y. S., 1062. Syl. 2 is as follows:

“Where specifications for a central office fire alarm system were so drawn as to confine all possibility of bidding to one company, though there was at least one other engaged in the same business, there was an utter failure to comply with laws 1909, c. 55, Sec. 120, requiring an opportunity for competition

in bidding on municipal contracts, and a contract let to such company is void."

The specifications in that case went into a wealth of detail, providing, for example, a detachable box 15 inches high and $2\frac{3}{4}$ inches wide, and glass tubes $2\frac{1}{2}$ inches in outside diameter and $\frac{1}{8}$ inch thick, a gong board 4 inches wide by 5 feet 4 inches high, not less than $\frac{1}{8}$ inch thick, and a dome over some part of the instrument of highly finished composition bronze of Moorish design, and the like.

It will be noticed from these occasional excerpts made from the specifications that almost any manufacturing company could construct apparatus to comply with the particulars specified. It is true that other items of the specifications were found to be patented articles, and therefore within the inhibition of the New York statute prohibiting the specification of patented articles; but the substantial defect found in the specifications was that, by accident or intention, they conformed almost exactly to the description of apparatus manufactured by one particular company. At page 1065 the court says:

"It is claimed by the defendants that the specifications do not intend to require and do not require that the precise instruments therein described shall be supplied; that other instruments or appliances having equivalent functions and producing the same results could be furnished; and that when furnished the contract would be complied with. In my opinion the specifications are not open to such a liberal construction. The only bids to be considered are such as cover all apparatus, material and work 'called for under these specifications.'

* * * * *

"If I am right in my construction of the specifications, if in fact they limit the opportunity for bidding to the Gamewell Company, they fail utterly to comply with the statute. The statute requires an opportunity for competition; and where this opportunity is given in form only and not in fact, its spirit is violated. The statutes which require public works to be let by contract and to the lowest bidder are enacted in the public interests. They are a bar against fraud and they should receive from the courts the most liberal and fair interpretation."

Although not pertinent in this immediate connection, it may serve a purpose to further quote from the decision last mentioned, at page 1068:

"It is also said that this action is not brought in good faith; that the person really interested is a competitor of the Game-well Company. If so, it is immaterial. The plaintiff is in fact a tax-payer. If in this action he shows illegal action on the part of the city, he is entitled to the assistance of the court, although he may have been induced to bring it by some private grievance."

There remains to be considered the contention made on behalf of defendant's counsel that this court should not, by a process of injunction directed against the carrying out of this contract, attempt to control the discretion of the director of public safety. The argument in this behalf is based upon a total misconception. The defect in the process of awarding this contract is that under the specifications as drawn the director of public safety, in awarding the contract, had no discretion whatsoever. One make of automobile and one only could conform to the specifications, with the result that the advertisement for bids was simply an idle ceremony. The possible fact that, upon new and broader specifications, admitting bids for various makes of cars of the same general class, the director of public safety may, in the exercise of a genuine discretion, select the car which was successful in the present letting, is not a reason for refusing the relief now prayed for.

In reaching the conclusions indicated by what has already been said, it has been necessary to reason from the evidence taken as an entirety. Manifestly it is impossible to state wherein every item of the city's specifications is at fault in preventing open competition. All the more it is impossible to state in detail what changes in the specifications would serve to admit free competition. However, the distinction between open and closed specifications is readily to be inferred from the opinion in the New York case last cited. For want of a more accurate designation, it may be said that specifications are open which admit

to competition commodities of the general class, purpose, description and degree of efficiency of the thing desired to be contracted for; and specifications are closed when the commodity for which bids are invited is required to conform in its minutest details to that exclusively controlled by a single person or corporation. This, at least, would appear to be so where the commodity in question is obtainable in a wide market in forms varying greatly in detail, but all conforming to the essential characteristics of a class.

The construction placed by this court upon the specifications here in question, in the light of the evidence presented, is in accord with the conclusions of the author of *McQuillin on Municipal Corporations*, Section 1203, in part as follows:

“A law demanding competition in the letting of public work is intended unquestionably to secure unrestricted competition among bidders, and hence, where the effect of an ordinance is to prevent or restrict competition and thus increase the cost of the work, it violates manifestly such law and is void, as are all proceedings had thereunder.”

What is thus declared to be true of an ordinance applies obviously to specifications, and it is unimportant whether in fact the provisions of an ordinance or specification increase the cost of the work, if in truth they have a tendency so to do, by limiting the possibility of securing the award to a single individual or corporation.

The same text-writer, in Section 1204, says:

“As already stated, one of the exceptions to the rule requiring competitive bidding exists where the subject-matter of the contract is a monopoly, as in the case of a contract for lighting, where there is only one light company in the municipality. On the other hand, a different proposition presents itself where there are several manufacturers who produce a certain article or where the material can be secured from two or more different localities. In such a case it is held in nearly all the decisions that bidding can not be restricted by requiring bids on an unpatented article manufactured by a particular firm, or material

1914.]

Fry v. Agler.

obtained from a particular locality. In other words, where specifications are so drawn as to confine the bidding to one company, firm or individual, although others are engaged in the same business and can do the work or supply the materials, a contract let thereunder is void."

A decree may be drawn as prayed for, enjoining the several defendants.

DRAINAGE RIGHTS OF AN UPPER PROPRIETOR.

Common Pleas Court of Franklin County.

GEORGE LOUIS FRY ET AL V. MCCLELLAND AGLER.

Decided, May, 1912.

Ditches and Drains—Surface Water May be Hastened Toward Its Natural Outlet—Lower Land Owner Without Remedy, When.

Injunction does not lie upon petition of a lower proprietor to prevent the collecting of water from a wash into a ditch and the hastening of it in its course toward the land of said lower proprietor instead of permitting it to spread over the field from which it was gathered, provided in so doing it is not diverted from its usual drainage channel or depression but the flow is merely expedited toward the natural outlet.

Donaldson & Tussing, for plaintiffs.

M. E. Thrailkill and *J. F. Rogers*, contra.

RATHMELL, J.

The evidence upon the whole made a question of defendant's right to collect into a ditch the surface waters which came upon his field through natural drainage channel, and to deliver same at a point in the natural drainage channel where it left his lands through a space about fifteen or twenty feet wide. The widest part of the natural depression leaving defendant's land was perhaps about eighty feet wide, but the lowest portion of the natural depression was from fifteen to twenty feet. On the north side of defendant's farm there was a washed-

out channel or depression extending about twenty rods, more or less, leading from the road down to the middle of the field, then disappearing. Through this channel the water from above, in wet times, was accustomed to spread out over several acres, then find its way through the space fifteen or twenty feet wide on to the land of the plaintiff, the lower proprietor. A tile ditch, some years ago, was laid through the *natural depression* across the farms of the parties and other lower proprietors to a proper outlet. It appears from the evidence that in times of wet weather this tile ditch was never able to catch and carry all the water which came that way, and that more or less surface water at such times came over the surface of the natural depression. Across the lower portion of defendant's field and over plaintiff's land below there was no surface ditch, but in wet times the surface water, as stated, from above through the wash on the north side of defendant's land spread over defendant's land, thence through the narrow space mentioned on to plaintiff's land, where it spread out some and found its way on down through a natural depression in the land to the outlet below, or was taken up by the tile drains.

About the 28th of February, 1911, the defendant made a plowed ditch from a point opposite the said depression fifteen or twenty feet wide to the end of this wash, leading from the road to about the middle of his field, connecting the wash with said depression or near to it. This is the grievance complained of, and plaintiff contends that defendant can not thus collect and hasten the water and cast it upon him.

There appears to have been some modification of the rule as to the drainage of surface waters as formerly announced. For example, in *Kemps v. Widows' Home*. 6 Ohio Dec. (Reprint), page 1052, referred to in my former opinion, the matter was thus stated in the court's opinion, speaking of the flow of surface waters from the higher to the lower land:

"In such a case the doctrine is well settled, with some exceptions which do not seem to be very well defined in Ohio, to the effect that the flow may be increased to a certain extent by the necessary and proper use of the higher land; that an increase

1914.]

Fry v. Agler.

by the act of man of the water which flows upon the lower estate is an invasion of the right and actionable *per se*—that the servitude in such case is to receive the natural flow of water as it comes from the heavens in the form of rain and snow.”

And again in *Livingston v. McDonald*, 21 Iowa, 160, it is stated:

“The lower land owed to the high land the service or servitude of being bound to receive all the water which naturally (without the hand of man) flowed down upon it. The inferior proprietor could not obstruct the flow to the injury of the superior, nor could the latter make the servitude more burdensome.”

It now appears to be the prevailing rule that the flow of surface waters along natural depressions or drain-ways may be hastened and incidently increased by artificial means so long as the water is not diverted from its natural flow.

In *Mason v. Commissioners*, 80 Ohio State, 151, 159, the court in opinion say:

“It is well settled under the rule of both the common and civil law that surface water can not be collected into a ditch and discharged upon the lands of another to his damage; but the land owner may, in the reasonable use of his land, drain the water from it into its natural outlet, whether that be a water course or a natural drainage channel, and thus increase the volume and accelerate the flow of water of such water course or channel without incurring liability for damages to the owners of lower lands.”

* * * *

(And quoting from *Farnham on Waters and Water Rights*):

“It will also be seen that the civil law rule has been modified to some extent so as to permit hastening of the flow of water toward the natural outlet which was not originally permitted. Therefore no arbitrary rule can be laid down which will govern all cases, but each case must be dealt with upon its facts, applying the rule which will be reasonable under the circumstances, under the general rule that the water should be allowed as far as possible to seek its natural outlet.”

“When it is settled that there is a right to drainage along the natural depressions or drain ways, the question arises whether

the flow of water along these channels may be increased by artificial means. The great weight of authority answers that question in the affirmative. Therefore the owner of the upper property may improve it for any purpose for which he desires to use it, and may construct channels to hasten the flow of water if it is not diverted from its natural flow. This improvement may be for the purpose of agriculture, so that the upper proprietor does not increase the servitude of the lower proprietor by digging on his lands for the needs of cultivation a system of ditches to carry the water to the place from which it is discharged in the most advantageous manner for the cultivation of such lands." *Farnham on Water Courses*, Section 893.

"If water reaches the land of a servient proprietor at the place where, in the state of nature, it was accustomed to flow, the manner in which it is conducted over the dominant tenement is immaterial, even though it is collected in a channel and cast upon the lower land more rapidly and in greater quantity than it otherwise would have been." *Dam v. Cooper*, 103 Ill. App., 4.

"The owner of lands has a right to drain them by artificial ditches, although thereby the water is precipitated more rapidly and in greater volume on the lands of the adjacent proprietor which, in the absence of the ditches, would have flowed in a different direction and provided he acts with a prudent regard for the welfare of his neighbor." 68 Ala., 280; 44 Am. Rep., 147.

In 19 L. R. A. (N. S.), p. 167, there is collected in the note authorities on the right to hasten the flow of surface waters along natural drain ways. It is there stated and supported by a number of authorities:

"That the principle very generally accepted by the courts that the owner of higher land may not concentrate at one point surface water diffused over the surface and discharged in a mass upon the lower land, does not apply to natural depression or drain ways through which the surface water on the higher lands drains on to the lower land. On the contrary it is established by the great weight of authority that the flow of surface water among such depressions or drain ways may be hastened and incidently increased by artificial means so long as the water is not diverted from its natural flow."

And continuing the author, quoting from *Dayton v. Drainage Commissioners*, 128 Ill., 271, says:

“The rule undoubtedly is that the owner of the higher tract of land has the right to have the surface water, falling or naturally coming upon his premises by rains or melting snow, pass off through the natural drains upon or over the lower servient lands next adjoining; and the owner of the dominant heritage has the right by ditches and drains to drain his own land into the channels which nature has provided, even if the quantity of water thrown upon the next adjoining lands is thereby increased.”

In 30 A. & E. Ency. of Law, p. 337, discussing the subject of drainage of surface waters, after having stated the rule that the owner of lands which surface water has reached has no right to collect it into a ditch and discharge it upon the lands of another in quantity or volume exceeding what would have reached the latter by natural drainage, the author continues:

“This rule, however, does not prohibit the owner of lands from cultivating his lands or draining them by artificial ditches, though surface water is thereby precipitated more rapidly upon the lands of the adjacent owner below, provided he does not cause water to flow on such lands which, but for the artificial ditches, would have flowed in a different direction, and provided he acts with a prudent regard for the interests of such adjacent owner.”

In the case of *Manteufel v. Wetzel*, 133 Wis., 619, it is held:

“An upper land owner is not liable for collecting in a ditch following the course of the usual flow of surface water the surface water which formerly spread over the surface and hastening its flow on the lands of the lower proprietor.”

Farnham in his work, at Section 889-f discusses the cases of Minnesota and Wisconsin as unique.

“These states at first attempted to follow the common enemy or, as they call it, the common law doctrine, and they have succeeded in originating a position by which its servitude is sanctioned far in advance of anything known to the civil law, so that instead of adhering to the common enemy rule they have ap-

parently adopted a rule by which the upper owner has an unlimited right of drainage over the lower proprietor, whether it is a natural course or not."

I should hesitate to cite this case as authority for the rule announced in this case in view of the foregoing criticism except that it apparently supports the rule where it is a natural draining course, such as we have in this case.

Under these authorities and the evidence in this case, in the interest of agriculture it appears just and proper that the water from the wash should be permitted to be collected into a ditch following the course of the usual flow of surface water and hastened to its natural outlet, instead of being allowed to spread over the surface of the field, so long as it was not diverted from the natural drainage channel or depression and would naturally flow in that direction. While the water is precipitated more rapidly upon the lands of Fry, no more water was caused to flow by the artificial ditch than came upon Agler, and none that, but for the ditch, would have flowed in a different direction.

It does not appear that the servitude was altered by the fact of the underground ditch. I was at first inclined to think it was; such might be the case if it appeared that all the water could readily have been turned into the tile ditch. But the evidence is that the tile ditch was of such size that this could not be done; that is, it appears that during wet spells more water came down than tile of that size could carry.

Defendant's claim that plaintiff has obstructed the drainage course is not sustained by the evidence. In accordance with the conclusion here reached that plaintiff is not entitled to the relief prayed for, plaintiff's petition and the defendant's cross-petition are dismissed.

1914.]

State v. Smith.

AS TO BAIL IN CASES OF MURDER IN THE FIRST DEGREE.

Common Pleas Court of Clark County.

STATE OF OHIO V. ARTHUR B. SMITH.

Decided, January, 1914.

*Criminal Law—Circumstances Which Warrant Admission to Bail—
Where the Defendant Has Been Tried for Murder in the First Degree with the Result of a Jury Disagreement.*

1. Where one has been tried for murder in the first degree, the result of the trial being a disagreement of the jury, and it is discharged for inability to agree, the defendant will not be admitted to bail merely because of such disagreement and discharge of the jury.
2. If the evidence exhibited on the hearing of the application for bail in such a case, be of so weak a character that it would not sustain a verdict of guilty against a motion for a new trial, the court will admit to bail.
3. If the evidence offered in support of the application for bail in a case of murder in the first degree, after such disagreement and discharge of the jury, is the same evidence which was submitted to the jury on the trial, and the court would not have set aside a verdict of guilty had it been returned by the jury on such evidence, bail will be refused, where it does not appear that the life of the defendant would be endangered or his health seriously impaired by continued imprisonment, or that he can not be afforded speedy retrial.
4. A defendant charged with murder in the first degree, will not be admitted to bail merely because the evidence against him is circumstantial.

HAGAN, J.

In this case the defendant, Arthur B. Smith, was tried on an indictment for murder in the first degree, by poisoning his wife, Florence Cavileer Smith, the result of the trial being a disagreement of the jury, and its discharge in consequence of its inability to agree.

The defendant has filed a motion for his admission to bail in this case, during the pendency and determination thereof, alleging as grounds for such motion:

"1. That during the January term of this court said cause came on for trial, and that there was a mistrial of same wherein nine of said jurors trying same voted for the acquittal of the defendant.

"2. The evidence adduced in said trial was entirely circumstantial, wherein: (a). The proof was not evident nor the presumption great of any guilt of the defendant as he stood charged. (b). Said evidence would not sustain a verdict of guilty upon said charge.

"3. The defendant has been imprisoned herein since the 22d day of November, 1912, and is now confined in the county jail of this county, and if an immediate retrial of said cause is not afforded him, such confinement will result in great physical and mental injury to him.

"4. That the state of Ohio will not be able to afford the defendant a speedy or immediate retrial of this cause."

It appears to the court proper to determine, in the first instance, the principles upon which, in the state of Ohio at least, such an application should be considered and disposed of.

The cases on this subject in Ohio are not numerous; the earliest and the leading case is that of *State v. James Summons*, decided by the Supreme Court, in 1850, and reported in the 19 Ohio Reports, at page 139.

The syllabus of that case is as follows:

"The court will not, as a matter of course, admit to bail because the jury in a trial for murder have not agreed upon a verdict.

"If the evidence exhibited on the hearing of the application, be of so weak a character that it would not sustain a verdict of guilty against a motion for a new trial, the court will admit to bail."

In that case, as appears by the statement of facts contained in said report, the jury were unable to agree upon a verdict, and were consequently discharged by the court; whereupon a motion was made to admit the prisoner to bail, upon the ground that the disagreement of the jury rebutted the fact that the proof was evident or the presumption great of his guilt, and entitled him to his liberty by sufficient sureties.

1914.]

State v. Smith.

The defendant thus invoked the protection of Section 12, Article VIII of the Constitution of Ohio, which provides that all persons shall be bailable by sufficient sureties, unless for capital offenses, where the proof is evident or the presumption great.

The trial court overruled the motion for admission to bail. When the case was taken on error to the Supreme Court, that tribunal said (19 Ohio, 139):

“Who is to decide whether the proof be evident, or the presumption great? Most undoubtedly the same authority which prescribes the amount of bail, and passes upon the sufficiency of the sureties. * * *”

“The fact that the testimony given on the trial, did not produce full conviction of guilt in the minds of the twelve jurors, would be a strong circumstance to urge to the court when invoked to the exercise of so high a discretion as that of admitting to bail a prisoner charged with the crime of murder; this fact would come with redoubled force, if a second jury should fail to agree upon a verdict, with the same evidence applied to another indictment for the same offense. But, however numerous such results, they would never amount to a rebuttal of the fact that ‘the proof was evident or the presumption great.’ In other words, they would never amount to a constitutional requisition upon the judges to admit the prisoners to bail. The appeal must still be addressed to the discretion of the court; a sound legal discretion it is true, but one that can only be moulded into action by the evidence brought to bear upon the indictment.

“Other influences often tend to produce a disagreement of the jury. Where the evidence fails fully to satisfy the mind of the guilt of the prisoner, especially in a capital case, the jury are apt to render a verdict of acquittal.”

The court then proceeds to quote with approval the rule stated in the case of *Commonwealth v. Keeper of the Prison*, 2 Ashmead, 227, that:

“A safe rule, where a malicious homicide is charged, is to refuse bail in all cases, where a judge would sustain a capital conviction, if pronounced by a jury, on such evidence of guilt as was exhibited to him on the hearing of the application to

admit to bail; and, in instances where the evidence for the commonwealth is of less efficacy to admit to bail."

The Supreme Court in *State v. Summons*, proceeds to say:

"So with us in Ohio, if the evidence exhibited on the hearing of the application to admit to bail, be of so weak a character that it would not sustain a verdict of guilty, against a motion for a new trial, the court will feel it its duty, under the Constitution, to adjudge the prisoner 'bailable by sufficient sureties.'"

In the case of *Hampton v. State*, 42 Ohio State, at page 404, decided in 1884, the court cites with apparent approval the rule laid down in *State v. Summons*, that:

"The court will not, as a matter of course, admit to bail because the jury in a trial for murder have not agreed upon a verdict.

"If the evidence exhibited on the hearing of the application, be of so weak a character that it would not sustain a verdict of guilty against a motion for a new trial, the court will admit to bail."

In a very recent case decided in 1910 by the Common Pleas Court of Licking County, *State v. Woolard et al*, 12 Ohio N.P. (N.S.), at page 395, the court states in the syllabus:

"Under the constitutional provision that all persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great, an application for bail by one who is under indictment for murder in the first degree, is addressed to the sound legal discretion of the court, with the presumption against admission to bail, and the burden is upon the applicant of showing that the proof is not evident, or the presumption is not great."

Judge Nicholas, in rendering the opinion, quoted with approval the rule already cited as having been laid down by the Supreme Court in the case of *State v. Summons*, and also quoted with approval the opinion of the Supreme Court in *Kendell v. Tarbell*, reported in 24 Ohio State Report, at page 196, in these words:

1914.]

State v. Smith.

"The indictment raises the presumption required by the Constitution to justify the refusal of bail."

Judge Nicholas then goes on to say:

"Guided by these authorities, which I understand speak the present law of this state on the subject, we learn:

"1. That this question is addressed to the sound legal discretion of the court;

"2. That the fact of an indictment raises the presumption required by the Constitution, to justify the refusal of bail—or, in other words—throws the burden upon the defendant of showing that the proof is not evident, or the presumption is not great;

"3. That the court must deny the application for bail unless he would set aside a conviction upon the showing made on the motion."

It is thus seen that courts in Ohio ever since the opinion was rendered in *Summons v. Ohio*, have invariably adhered to the rule stated in that case.

Counsel for defendant have referred to some authorities in other states, in support of their contention that the disagreement of the jury should raise an inference that the proof is not evident and the presumption is not great as against the accused who seeks bail.

Notable among these cases thus cited is *State v. Hyde*, 234 Mo. Supreme Court Reports, page 207, but an examination of that case discloses that the defendant had been admitted to bail at the time of the indictment, had given a continuing bond, large in amount, had gone to trial the next term, and had given no indication of any purpose to abscond or thwart the trial.

It does not appear upon what showing the defendant had originally been admitted to bail in that case. It may have been quite a sufficient one to negative that the proof was evident or the presumption great, of guilt.

The error complained of was that after having admitted the defendant to bail, and after he had gone to trial, without indication of any purpose to abscond or thwart the trial, it was an abuse of the court's discretion, of its own motion, to revoke his

bail bond at the close of the state's case, and order him to jail on the ground that "the testimony so far given amounts to a presumption that under the law deprives the defendant of the right to go on bond."

It thus appears that the case of *State v. Hyde* affords no help in the consideration of the motion now pending in the case at bar.

Much stress is laid in the brief of counsel for defendant, on a remark made by Chief Justice Field, afterwards a member of the Supreme Court of the United States, when sitting as one of the supreme judges of the state of California, in the case of *People v. Tinder*, 19 Cal., at page 539.

The only question actually involved in that case was whether before trial, evidence could be received on behalf of the defendant to negative the presumption of guilt arising from the indictment against him, in which the court held that such evidence could not be received.

After disposing of the case Judge Field remarked that where upon trial the evidence for the prosecution and the defense had been produced and the jury had disagreed, or where after verdict a new trial has been granted on account of the insufficiency of the evidence to warrant a conviction, bail is sometimes taken without hearing other evidence as to the guilt or innocence of the accused.

But it is worthy of special note that in the case of *Salvator Troia*, on habeas corpus, 64 Cal., page 152, the very rule approved in the case of *Summons v. State*, 19 Ohio, is cited with approval at page 153, where the court says:

"It is a safe rule where malicious homicide is charged, to refuse bail in all cases where a judge would sustain a capital conviction if pronounced by the jury on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail."

The attention of the court is called to a statement in 5 Cyc., page 64, which refers to cases in several states, appearing to uphold the contrary rule, viz: that bail will in some cases be al-

1914.]

State v. Smith.

lowed even where the jury might, and perhaps ought, upon the same evidence to render a verdict of guilty of murder, but in the same statement it is said that as a general rule bail should be denied whenever the trial court would sustain a verdict of conviction for a capital offense, if rendered on the same evidence given on the application for bail, citing a large number of authorities.

It appears that the rule in Ohio is approved by the prevailing opinion of the courts of last resort in other states.

The evidence, to which the attention of the court is directed in this case, is that which was received on the trial, a full transcript thereof being in the possession of the court. No additional evidence is offered in support of the motion for bail.

One of the grounds for the motion is that the evidence adduced at the trial was entirely circumstantial. This statement is not accurate, but if it were deemed correct, would not have weight in the mind of the court.

As is well understood, and has been repeatedly stated by courts, circumstantial evidence may be the most cogent evidence in proof of the guilt of one accused. Of course, the evidence, whether circumstantial—that is, indirect—or that of witnesses who testify to seeing the very act committed, must be so strong as to negative reasonable doubt of the guilt of the accused.

Another special ground of the motion urged is that the defendant has been in prison since the 22d day of November, 1912, and is now confined in the county jail of this county, and if an immediate re-trial of said cause is not afforded him, such imprisonment will result in great mental and physical injury to him.

There is no evidence offered or claim made that the defendant is now suffering from any disease, so we have the mere opinion of the defendant, or his counsel, or both, that if his confinement is continued for a considerable period of time, it will result in great physical and mental injury to him. It is apparent that this affords no special ground for admitting the prisoner to bail. See, *In re Fraley*, 3 Okla. Criminal Reports, 719, reported

in 109 Pac. Rept., 295; *Ex Parte Johnson*, 60 Tex. Criminal Reports, reported in 39 L.R.A.(N.S.), 916.

The cases where it was sought to obtain bail because of the alleged bad effect of continued confinement upon the health of the prisoner, were all where there was a clear showing of existing disease in the prisoner, which would be much aggravated, or result fatally if the defendant were not given his liberty.

Without citing authorities at length, reference is made to *In re Thomas*, and notes, cited in 39 L.R.A.(N.S.), page 771.

Another ground stated for the motion, is that the state of Ohio will not be able to afford the defendant a speedy or immediate retrial of this case. The defendant has been in prison since the 22d day of November, 1912.

A considerable time elapsed during which the defendant was endeavoring to dispose of indictment by various pleas, or obtain orders of the court for examination of certain parts of the body of Florence Cavileer Smith. The case was finally put at issue on the 27th day of January, 1913, and assigned for trial on the 5th day of March, 1913, at which time the defendant urgently moved for a continuance of the case until the May term, on the ground that he wished to avail himself of permission to examine said parts of the body of Florence Cavileer Smith, if the same should be granted by the court.

The court made an order for examination of parts of her body, by the defendant, and for the purpose of enabling the defendant to avail himself of such order, granted a postponement of the case until the 15th day of April, 1913, at which time the trial began, and the same was terminated on the 5th day of May, of the same year.

There has certainly been no delay on the part of the state or of the court, in the matter of granting the defendant a speedy trial, and if the prosecuting attorney, and his assistant in this case, shall decide to again try the case, another trial will be afforded as soon as the condition of the business of the court will permit the same in justice to all parties concerned.

In view of the premises, the court is constrained to apply to this case on the pending motion, said rule stated by the Su-

preme Court in the case of *Summons v. State of Ohio*. In doing so the court desires to avoid, as far as possible, the expression of any opinion as to the guilt or innocence of the defendant, which might prejudice either him or the state of Ohio, as the case might be, on a re-trial. So far as possible the court adopts the principle stated by the Supreme Court of Oklahoma, in *Re Thomas*, already cited, at page 765, as follows:

“We will not comment upon the evidence lest our comments should influence the final trial. To decline to do so seems to be the universal practice as it has always obtained in such cases.”

Under the rule already stated it is clear to the mind of the court that he should refuse bail in this case if the evidence exhibited to him, which is that taken on the trial, and appearing in the transcript in the possession of the court, is such that if the jury had rendered a verdict of guilty thereon, the court would not have set aside the verdict.

The court, upon careful consideration of said evidence, finds a line of evidence, which if believed by the jury, would have warranted it in rendering a verdict of guilty, opposed to a line of evidence, which if the jury believed it would have warranted it in acquitting the defendant.

It is obvious, therefore, that if the jury had rendered a verdict of guilty, the court would not have been justified in setting such verdict aside.

The motion for bail is therefore overruled

**ALIMONY TO WIFE MADE A LIEN ON REAL ESTATE
TRANSFERRED BY HUSBAND IN FRAUD
OF HER RIGHTS.**

Common Pleas Court of Hamilton County.

SARAH E. FOX V. FRANCIS C. FOX ET AL.

Decided, January, 1914.

Husband and Wife—Service by Publication in Suit for Alimony—Allowance of, Made a Lien on Real Estate—Transferred by Husband for the Purpose of Defeating Her Claim.

1. An abandoned wife, a faithful helpmate for more than thirty years and now in feeble health and without any means of support, whose husband has real estate in the county in which the suit is brought estimated to be worth \$1,500, is entitled upon service by publication upon her absent husband, to alimony and counsel fees, and said allowances may be made a charge upon the real estate in question. (*cf. v. Fox et al.*)
2. These charges will be made a lien upon said property, notwithstanding it was transferred to a "dummy" for one dollar, by deed executed by the husband only a few days before the filing of suit by the wife; and the lien of a building association under a mortgage, executed by the "dummy" subsequent to the filing of suit by the wife, will be declared subordinate to that of the wife, where it appears that the attorney for the husband and for the building association were one and the same person.

Wm. H. Schweikert and J. T. Rhyno, for plaintiff.

August W. Bruck, contra.

COSGRAVE, J.

This is an action for alimony; also to set aside and hold for nought a deed of conveyance from the defendant Fox to the defendant Joachim, to charge said property with the equities of the plaintiff and make her claim a lien on the real estate in the petition described; for an injunction against both of the defendants restraining further alienation, and also for attorney's fees.

It appears that the plaintiff, Sarah E. Fox, and Francis C. Fox, the defendant, were married at Ft. Sidney, Neb., Septem-

1914.]

Fox v. Fox.

ber 18, 1880. Several children were born of the marriage, all of whom are now fully grown.

Fox and his wife came to this county in 1899, and on June 6th of that year, purchased the real estate described in the petition and occupied the same, living together as husband and wife until sometime in the month of September, 1911, when Fox abandoned his wife and went to a sister living in Los Angeles, Cal. Mrs. Fox continues to occupy this property, which practically yields her no revenue. It is in evidence that she is very frail, delicate and sickly; and from the testimony of her neighbors and friends, is shown to be a most excellent woman.

It is alleged in the petition that the defendant has been guilty of neglect of duty for many years, that he has failed and refused to provide plaintiff with the necessities of life, has refused to maintain or support her in any manner whatsoever, but has compelled her to seek employment in a menial capacity, and thus with the aid of her grown children, at least to the extent of their ability, obtain a living for herself and maintain him while his time was spent in idleness. There is no testimony that he was a bad man; but simply an idler, a dreamer, a ne'er-do-well. The property sought to be charged with the lien of any judgment for alimony that may be rendered in this case, is fully described in the petition.

It is in evidence that on or about the 14th day of April, 1913, the said defendant Fox, having forsaken his wife about a year and a half previous thereto, made a conveyance of the property described in the petition to his co-defendant, Michael Joachim, for the stated consideration of one dollar and other good and valuable considerations, but that in fact no consideration whatsoever passed between the parties, and it is alleged that said conveyance was made solely for the purpose of placing this property out of the name of the defendant so as to render ineffectual any judgment that might be recovered by the wife against the husband in proceedings instituted by her for support and maintenance.

It is clear that the said Joachim was a mere volunteer in the said pretended conveyance with full notice of the relationship

between the plaintiff and his co-defendant, and that it was in furtherance of a conspiracy between Joachim and Fox by which the wife was to be deprived of any opportunity to assert a claim upon said real estate for support and maintenance by way of alimony. It is evident that said conveyance is a mere sham and subterfuge and while the said Joachim asserts title to said real estate, that in law and in fact he has no title, but that the whole transaction reeks with fraud.

It is in evidence that a mortgage for \$500 was executed by Joachim to secure a loan from the Franz Joseph Building Association. There is thus presented for the consideration and determination by the court three matters:

First, whether the wife is entitled to alimony;

Second, was the conveyance by the defendant Fox to his co-defendant Joachim, a *bona fide* transaction or a fraud; and

Third, the relationship of the Franz Joseph Building Association to the property described in the petition.

There was no personal service upon the defendant, Fox, in this case. There was, however, a service by publication in which reference was made specifically to the nature of the relief sought, namely, for alimony, to set aside this conveyance of real estate on the ground of fraud and for other equitable relief. Proof of service by publication has been duly made to this court in conformity to the provisions of the statute. The defendant, Joachim, was duly served and filed an answer herein. The court is therefore of the opinion and so finds that the defendant, Fox, is before this court for all the purposes set forth in the petition, including an allowance of alimony, and the appropriation and subjection of the property described in the petition to the payment of the same. In this conclusion, the court is following the rule laid down by our Supreme Court in the case of *Benner v. Benner*, 63 O. S., p. 220, wherein it is said, first:

“Service by publication is authorized by Section 5048 of the Revised Statutes [Section 11292, G. C.], in an action by a wife for alimony and support of her children against the husband who deserted his family and became a non-resident of the state, where the only relief sought is the appropriation of real property of

1914.]

Fox v. Fox.

the husband situated in the county where the action is brought, to the payment of the amount that should be allowed for such alimony and support."

2. "Such an action is substantially one in *rem*, and the court has jurisdiction at its commencement to grant a preliminary injunction preventing the disposition of the property by the defendant, pending the suit, and on completion of the service by publication, to decree the relief sought."

The evidence is conclusive as to marriage between the parties, of his neglect and failure to support his wife, that while they were living together she was compelled to rely in a measure upon the kindness of her friends and neighbors for support, with such little help as her children were able to give her.

The evidence is conclusive that this continued for many years, that about two years ago he deserted and abandoned her, and that she is now practically penniless.

It appears that the real estate described in the petition is valued upon the tax duplicate at \$1,530, and there is testimony before the court that it is reasonably worth about this sum. The court is, therefore, of the opinion, and so finds, that the plaintiff is entitled to an allowance of alimony for her maintenance and support, and that the sum of \$500 is a fair and just allowance by way of alimony for the support of the plaintiff, and the court decrees that said sum is and shall be a charge upon the real estate described in the petition, and the court further orders and decrees that unless said sum be paid within ten days from the entering of the decree herein, an order for the sale of said property shall issue from this court. The court is further of the opinion and finds that the plaintiff is entitled to an additional allowance by way of alimony for her support and maintenance in the sum of \$15 per month, to continue until the further order of this court, which shall likewise be a charge and lien upon real estate described in the petition. The court is also of the opinion and so finds, that the plaintiff is entitled to a reasonable counsel fee in this case, which the court allows in the sum of \$100, and which shall also be a charge and lien upon the real estate described in the petition.

The court might well stop here, if it were not for the conveyance by the defendant, Fox, to his co-defendant, Joachim, of the real estate described in the petition. We must now consider this conveyance and determine whether it was real or only pretended. The consideration of this feature of the case suggests a further inquiry into the facts presented by the evidence herein.

The petition was filed on April 28, 1913. A restraining order was issued at that time, as prayed for in the petition. It appears that some considerable time before this date the husband, through his attorney, sought to induce the wife to join him in a deed for the sale of this property, the wife at that time being in one of our hospitals, seriously ill. This she refused to do.

Following this refusal on her part, there took place a number of singular and mysterious transactions, concerning this real estate. These may be summarized as follows:

1913, April 14. Deed from Fox to Joachim, \$1 and other valuable considerations; apparently executed on that date.

1913, April 19. Deed from Fox to Joachim filed.

1913, April 19. Mortgage from Joachim to Franz Joseph Building & Loan Co. for \$500; apparently executed on that date.

1913, April 5. Check for \$500 drawn by the Building & Loan Co. to Joachim.

1913, April 28. Petition herein filed.

1913, May 19. Mortgage from Joachim to Franz Joseph Building & Loan Co. filed for record.

1913, April 30. Check for \$500 paid in Los Angeles, Cal., to Fox.

1913, May 7. Check paid by drawee in this city.

Any attempt to reconcile these transactions only serves to confuse the situation, and does not explain the peculiarly conflicting dates purporting to be the days and months on which these alleged transactions are said to have taken place.

The defendant, Joachim, on the witness stand, admitted he knew nothing whatsoever about the transaction, that he had no means with which to purchase this property from Fox, being possessed of only two dollars at the time. It appears that the defendant, Joachim was an employee or sort of a servant of the

1914.]

Fox v. Fox.

attorney of Fox, who is also the attorney and president of the Franz Joseph Building & Loan Co. The secretary of this company testified that he did not know Joachim.

From the foregoing and other facts presented by the evidence, the court is satisfied that Joachim was a mere tool or dummy in this entire transaction, through whom the defendant, Fox, sought to divest himself of this property in fraud of the rights of his wife, his faithful companion, helper and caretaker for over thirty years.

The court is satisfied from the evidence that the deed from Fox to Joachim was without any sufficient consideration, if any at all, and was executed in consummation of a fraud and should be set aside and held for naught.

While the building and loan company is not seeking affirmative relief herein, yet nothing to the contrary appearing, it seems from all the testimony presented, that the sum of \$500 passed from the building and loan company to the defendant Fox.

It may however appear from the facts herein that upon the sale of this property, the building and loan company might be subrogated to whatever interest might be coming to Fox after the payment of the sums above mentioned, which are decreed to be prior liens upon this property.

It may well be said that Fox having used Joachim to obtain this \$500 by way of a loan from the building and loan company giving a mortgage to secure the same, that the transaction would be treated as though Fox himself had given the mortgage to the building association and then he would therefore be estopped to deny its validity as against the said building and loan company. Thus the Franz Joseph Building & Loan Co. may be protected as to said loan.

The court is led to some of these conclusions from the fact that the attorney for the defendant Fox was at the same time the attorney and president of the building and loan company, was in fact its agent, and it is bound by his acts in the matter.

The court feels that the attorney in this matter was probably misled by over-zeal for his client, Fox, and was not as careful

of the interest of the building and loan company as he might otherwise have been.

The court is aware that in this entire matter it may appear to be straining the law, yet it would be strange, indeed, if a husband possessing property within the jurisdiction of this court could flee from its jurisdiction, abandon his wife, sick, helpless and penniless in her declining years, and that the law could offer her no relief.

The defendant Fox knew he had this property in our county, that it could be and ought to be subjected to the support and maintenance of his wife.

The defendant Joachim, the fraudulent grantee, knew the same, the building and loan company knew it through its authorized agent and attorney, and it can not be heard to complain as to the relief herein granted to the injured wife.

In the determination of this case, this court believes it is only following the language of our own Supreme Court in the case above cited, wherein it says at page 228:

“It is perhaps needless to say that there is a strong tendency on the part of the courts to uphold their jurisdiction in cases of this kind.”

This court believes that under the above decision it not only has the right to uphold but if needs be to enlarge its jurisdiction in order to secure to the plaintiff every relief to which she may be entitled under our laws.

Counsel will prepare a decree in conformity with the foregoing.

1914.]

In re Steube.

INVALIDITY OF THE SALES-BY-WEIGHT STATUTE.

Common Pleas Court of Franklin County.

IN THE MATTER OF THE PETITION OF HENRY H. STEUBE, FOR
WRIT OF HABEAS CORPUS.*

Decided, 1913.

Constitutional Law—Act Requiring that Certain Articles be Sold by Weight or Numeral Count—Held to be an Unreasonable Exercise of Police Power.

Section 6418-1 as amended, providing that "all articles hereinafter mentioned, when sold, shall be sold by avoirdupois weight or numeral count unless by agreement in writing of the contracting parties, is an arbitrary infringement upon the liberty and property rights of citizens, including the right to contract; and furthermore by its adoption there has been put into effect a prohibitive criminal statute which is not reasonably necessary for the accomplishment of the purpose aimed at and is unduly oppressive upon individuals engaged in such commercial transactions.

Williams, Williams, Taylor & Nash, for petitioner.

ROGERS, J.

Petitioner was arrested for violation of Section 6418-1, General Code, as amended March 29th, 1913 (Vol. 103 O. L., 136), relative to sales of specified articles, commonly known as the "sales-by-weight" statute. The substance of the charge in the affidavit, pursuant to which the arrest was made, is that petitioner sold about one-fourth peck of Irish potatoes other than by avoirdupois weight or numerical count to the affiant, and that the sale was not by agreement in writing. Upon the arrest of petitioner a writ of *habeas corpus* was allowed, and the only question now involved is as to the constitutionality of the act above mentioned under which the arrest was made. If the

*Affirmed by the Court of Appeals, *In re Steube*, 20 C.C.(N.S.),—; judgment of Court of Appeals affirmed by Supreme Court December 1, 1914; to be reported.

statute is constitutional, the prisoner should be remanded to the custody of the arresting officer; but if not, the prisoner is entitled to his discharge from custody.

The statute under consideration declares that "all articles hereinafter mentioned, when sold, shall be sold by avoirdupois weight or numerical count, unless by agreement in writing of all contracting parties." Here follows a list of the articles, principally, if not entirely of human food, among which are Irish potatoes, and then the statute provides as follows: "Whoever sells or offers for sale any article in this section enumerated, in any other manner than herein specified, shall be deemed guilty of a misdemeanor," etc.

Petitioner's counsel contend that the act is violative of both federal and state constitutions; the former relative to the power conferred upon Congress to "fix the standards of weights and measures" (Section 8, Article I, U. S. Const.) and relative to "due process" (Section 1, Article XIV, U. S., Const.); and the latter relative to the inalienable rights guaranteed to the people (Section 1, Article I, Const. of Ohio) of enjoying liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety; and there may be coupled with these guaranties, the inviolability of private property guaranteed by Section 19 of the same article. I shall not attempt to discuss the effect of the Federal Constitution on the act in question except as it may be referred to incidentally, but shall consider the act with reference only to the State Constitution and the conflict of the act, with the Bill of Rights.

Under the State Constitution, and especially the guaranties secured by the Bill of Rights, the right to acquire, hold and dispose of property is in effect declared to be inherent in the individual and inalienable. The right so guaranteed of necessity includes the right of contract concerning such property, and this right of contract is a property right, as much so in the enjoyment of property, as the right of acquisition, possession or protection. For property is of little or no value, if it may not be dealt with as an article of commerce and trade among individuals, and such dealings are based upon contract of some form.

1914.]

In re Steube.

The main contention, however, on the part of counsel for the state is that the state has the power to regulate by legislation the disposition of property in certain cases by virtue of its police power, and that the act in question is valid as a police regulation, and not in conflict with the guaranties secured by the Bill of Rights. The question, therefore, is, whether the act in question is a valid exercise on the part of the General Assembly of the police power of the state, and not violative of the Bill of Rights.

It is fundamental that the police power of the state is as much limited by the inhibitions of the Constitution as any other power which the state through its Legislature may attempt to exercise. In other words, the state can not justify its act under a police power and thereby override the Constitution.

Relative to what is police power, or the exercise of a police regulation, it is fundamental that laws passed in the exercise of such power must tend in a degree that is perceptible and clear towards the preservation of the public safety or the lives, health or morals of the inhabitants, or the welfare of the community. To justify interference on the part of the state in restraint of the inalienable rights guaranteed by the first section of the Bill of Rights, the General Assembly can exercise its police power in restraint of those rights only so far as such restraint is for the common welfare and equal protection and benefit of the people, "and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection and benefit. The judgment of the General Assembly in such cases is not conclusive." The state can not by legislative enactment arbitrarily infringe upon the liberty or property rights of its citizens, including the right of contract, so as to prevent them from making contracts in reference to any lawful pursuit or calling. unless, first, the interests of the public generally, as distinguished from those of a particular class, require such interference; and unless, second, the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals, even though the attempt to do so be under the guise of protecting the public in the exercise of police power.

See *Palmer v. Tingle*, 55 O. S., 423; *People v. Gillson*, 109 N. Y., 389; *Foster v. Woods*, 187 N. Y., 90, 94; *Lawton v. Steele*, 152 U. S., 133, 137; *In re Preston*, 63 O. S., 428, 438. As said by Justice Field in the *Slaughter House Cases*, 16 Wall., p. 87, "Under the pretense of prescribing police regulation, the state can not be permitted to encroach upon any of the just rights of the citizen which the Constitution intended to secure against abridgment." Among these is the right of the citizen to engage in any lawful business, and any arbitrary or unreasonable invasion of this right by the state, pursuant to its police power is void as an infringement upon the inalienable rights of the citizen guaranteed by the Constitution. "The Constitution gives inviolability to the right to make contracts," and the Legislature may deny the right only when it is required for the general welfare, and when it is promotive of public health or morals." See *In re Preston*, *supra*.

Adverting to the statute in question, it can not be successfully maintained that this legislation does not seriously infringe upon the right of the dealer in food products to pursue a lawful calling in a proper manner; and that it does not in a marked degree deprive him of his property by curtailing his power of sale and purchase. The food stuffs mentioned in the act, unless contracts in writing are entered into for their disposition, must be sold by weight or numerical count. The right to sell in bulk, or upon estimate of quantity, or by measure, or in any other mode, unless in writing, is prohibited. Can this be done under the guise of police power for the common welfare? I think not, unless this infringement and deprivation are reasonably necessary for the common welfare, or may be said fairly to tend to that result. While it is for the Legislature to determine what laws are needed to protect the public, it is equally true that such laws must fairly tend to that end and not invade the private rights of the individual. The virtual effect of the act is to deprive the buyer and seller of the right to contract for the articles specified in the act otherwise than by weighing or counting them. This in my judgment is an unwarranted exercise of the police power. The right to contract is a property right. The sale of food stuffs is a lawful

1914.]

In re Steube.

pursuit, and there is no public interest subserved by requiring sales of food stuffs otherwise than by weight or numerical count to be in writing. The act is not a statute of frauds, for it in no wise protects or restrains fraudulent sales or purchases. Such is not its object or effect. The contract in writing prescribed by the act for the sale of the articles enumerated, if sold by measure, will neither have any operative effect to prevent any fraud upon the public, or any class or portion of the public, nor afford any means of detection of fraud. The effect of the act is merely to make sales otherwise than by weight or numerical count more difficult for the seller and purchaser to execute. There is no logical connection between the pretended wrong and the attempted remedy.

There is nothing in the business of selling and buying the articles specified in the act to distinguish such business with respect to the mode of sale from any other business transaction involving contracts of sale of articles of commerce and trade not mentioned in the act. And the sole object of thus restricting sales and purchases is to prevent the making of sales in any other manner than by weight or numerical count. While the right of the General Assembly, subject to the paramount authority of Congress, to fix standards of weights and measures and to enforce their use may be conceded, I am of opinion that it has no power to abridge the privileges of sales of specified articles, while it allows to persons in every other transaction with regard to articles of commerce and trade this privilege.

It is said by Shauck, C. J., in *Hamann v. Heekin*, 88 O. S., 207, that "our Constitution ordains absolute equality of right and opportunity and all laws must, to be valid, operate equally upon all persons of the same class." This is not so, relative to the statute before us. It allows to persons dealing in every other article of commerce, privileges in the matter of sales and purchases prohibited to persons dealing in the articles of trade mentioned in the act.

Furthermore, the act is an unwarranted invasion of the right of seller and purchaser to make contracts by which the former is obliged to receive, and the latter is obliged to make payment

for the articles enumerated in the act according to weight or numerical count, without regard to any other consideration entering into the transaction. It is difficult to conceive how it conserves the public welfare or is a protection or benefit to the people to require a purchaser who may desire to buy food stuffs enumerated in the act in car load lots or by wagon load, or upon estimates of quantity, or in bulk, to do so by weight or numerical count unless his contract is in writing, so long as his transaction is otherwise lawful. If the state under the guise of a police regulation may make criminal the seller's and purchaser's right to contract concerning one lawful article of commerce, unless his contract is made pursuant to statute, when the safety and welfare of the community are not involved in the transaction, the state may regulate every sort of commercial transaction so as to make property and property rights and their enjoyment of little or no value.

There is no difference in principle between the case before us and *Fisher v. Woods*, 187 N. Y., 90, wherein an act to require under penalty all contracts of real estate agents with their principals to be in writing was declared unconstitutional as "an arbitrary infringement upon the liberty and rights of all persons who engage in selling real estate for others, with or without compensation, by making the person employed and acting without written authority guilty of a misdemeanor and punishable as a criminal." The business of selling the articles specified in the act under consideration is perfectly lawful and legitimate, and those who engage in that business are entitled to as full protection of their rights under the Constitution as that of any other person engaged in sales of any other articles of commerce, or in any other trades or occupations. While doubtless there are dishonest persons engaged in sales of the articles enumerated in the act, it is equally true that dishonest persons are found engaged in transactions involving sales of merchandise not mentioned in the act. Carried to its ultimate result, the seller and buyer of every article of merchandise may, by legislative enactment, be prohibited from making sales and purchases except in such mode as may be prescribed by statute, and thus the liberty

1914.]

In re Steube.

of the seller and purchaser to acquire property by contract may be abridged under police power, although the court may not be able to see wherein the restraining statute is for the common welfare, or equal protection and benefit of the people. The interests of the public as distinguished from those of a particular class, do not, as it appears to me, require such interference by legislation with property rights of the seller and purchaser to contract in any lawful manner concerning commodities subject to contract.

Furthermore, the act invades the right of enjoying liberty vouchsafed to the individual by the Constitution, in that it deprives him of the enjoyment of his faculties in pursuing a lawful business, and acquiring property. In *Palmer v. Tingle*, *supra*, it is held that, "The inalienable right of enjoying liberty and acquiring property, guaranteed by the first section of the Bill of Rights of the Constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restrictions as are necessary for the common welfare." And any oppressive exaction or unreasonable restraint upon the enjoyment of one's faculties is an unwarranted restraint upon our liberty and in contravention of the fundamental law of the land. The term "liberty," as said by Rappallo, J., in *People v. Marx*, 99 N. Y., 377, 386, "as protected by the Constitution is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by the Creator, subject only to such restraints as are necessary for the common welfare." And further quoting from Earl, J., in *re Jacobs*, 98 N. Y., 98, he defines liberty as "The right of one person to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." When the state restrains the enjoyment of one's faculties in pursuit of any important industry—the buying and selling of articles named in the act—by prohibiting the tradesman under penalty from pursuing his calling in only a specific mode, the inalienable right of enjoying liberty and acquiring

property, according to the foregoing definitions, is invaded. The state has, by this enactment, arbitrarily infringed upon the liberty and property rights of its citizens, including their right to contract, in that it has adopted means by a prohibitive criminal statute which are not reasonably necessary for the accomplishment of the purpose and are unduly oppressive upon the individuals engaged in such commercial transactions.

I shall not attempt to analyze the various cases cited by counsel for the state. An examination of these cases, however, discloses that the object and effect of the legislation embraced in these cases was to prohibit short weight and measures, and to prevent fraud in that regard. But such is not the object and effect of the legislation under consideration. Its effect is to prohibit sales otherwise than specified in the act unless by contract in writing, although the contract in writing in no wise prevents fraud in selling by short measures or otherwise.

I desire to advert to another feature of this case. By the Federal Constitution (Article I, Section 8, Clause 5), Congress is empowered "to fix the standard of weights and measures." In a limited way that power has been exercised. See Joint Resolution of Congress of June 14th, 1836, 5th U. S. Stat. at L. 133, wherein provision was made for transmitting to each state a full set of standards. Our state, in reconciliation of the resolution, has adopted the standards of weights and measures so fixed. See Section 6403 *et seq.*, General Code. The metric system has also been adopted as a standard of weights and measures by Congress. See 7th Fed. Stat. Ann., 1107-1108. It is provided in this act that "no contract shall be deemed invalid or liable to objection because the weights or measures expressed or referred to therein are weights or measures of the metric system." Without going into the question of the conflict, on the one hand, between the United States Constitution and the acts of Congress pursuant thereto relative to weights and measures, and, on the other, the act under consideration, it is clear that the vesting by the United States Statute of authority in Congress to fix the standards of weights and measures, followed by acts of Congress relative thereto, is a recognition by

1914.]

In re Steube.

the Federal Constitution and the acts of Congress, of the right of the people to use weights and measures in all lawful business transactions. The adoption of the constitutional provision and the exercise by Congress of its authority thereunder presuppose the right of the people to transact whatever lawful business may require the use of weights and measures as a means to that end. This right to use weights and measures is as much guaranteed to the people by the United States Constitution as if it were written in the Constitution itself; but the standards to be used are to be fixed by Congress. The right to use weights and measures being impliedly recognized by the United States Constitution, can the state by legislation abridge that right, by declaring in effect that no standard for determining quantity other than by weight or numerical count shall be used, unless the same is in writing? I shall not attempt to answer this question, but prefer to rest my decision wholly upon the grounds heretofore given.

Being of opinion that the act in question is violative of the Constitution of this state, the prisoner is ordered discharged from custody. Exceptions.

**RIGHT TO FREEDOM FROM NOISE IN A RESIDENCE
NEIGHBORHOOD.**

Common Pleas Court of Hamilton County.

STANLEY C. STALL v. GEORGE HILLMAN AND MARIE HILLMAN.*

Decided, June 2, 1914.

Injunction Against Operation of a Factory—Establishment Under Protest in a Residence Neighborhood—Whether Such Business is a Nuisance—Depends Upon the Contiguity of the Thing Complained of and the Nature of the Vicinage.

Injunction lies against the operation of a saw-mill and stair factory in an exclusively residence neighborhood, where the character of the neighborhood was well known to the owners of the plant before it was constructed and strong opposition was then shown to the establishment of such a plant in the neighborhood, but regardless of protests the mill was erected immediately adjoining plaintiff's home.

A. C. Roudebush, for plaintiff.

Gusweiler & Klein, contra.

COSGRAVE, J.

This is an action in which it is sought to restrain the defendants from carrying on a saw mill and stair factory immediately in the rear of plaintiff's property on Elvin avenue, South Norwood, Ohio.

The petition alleges that the plaintiff, since July, 1912, was a resident and owner of property on said avenue; that this avenue and all others in this immediate neighborhood and section of South Norwood are improved with costly and valuable buildings used exclusively for residence purposes, all being located in the Elsmere subdivision.

The petition further alleges that the defendants purchased a lot on Cavagna street, which joins plaintiff's lot in the rear; that in the summer of 1913, notwithstanding the protests and

*Affirmed, *Stall v. Hillman*, 20 C.C.(N.S.), —.

1914.]

Stall v. Hillman.

objections of the plaintiff and other neighbors, they built upon the rear end of their lot a saw mill and stair factory within one and one-half feet of plaintiff's property and extending its entire width.

It is further alleged that since the completion of said factory the defendants have maintained and operated a 10 H. P. gasoline engine for operating saws and planers, and that in the conduct of said business defendants cause and produce loud, disturbing, annoying and disagreeable noises by sawing and planing lumber and by the running of the gas engine.

It is further alleged that said noises disturb the peace and quiet of said neighborhood; that said loud and disagreeable noises begin about seven o'clock in the morning and continue throughout the entire working day, and that after discontinuing the operation by the said engine the defendants oftentimes work with hammers until late at night; that by reason of said noises, the reasonable and comfortable use of his premises have become greatly impaired and his property diminished in value, and if permitted to continue, the property and that of other residents in the neighborhood will be further damaged and rendered unfit for residence purposes.

Issue was joined on the questions presented in the petition. Very many witnesses were examined on both sides. There was the usual and somewhat inevitable conflict in testimony that is ever present where varying sensibilities of men and women are involved. There are, however, some matters as to which there can be no reasonable question.

The testimony shows beyond doubt that the scene of this trouble was in a section of our sister city of Norwood devoted exclusively to residences. All or nearly all of the residences adjoining the premises complained of are occupied by young married people, the husbands being engaged in various pursuits, some in the city of Cincinnati and some in the city of Norwood. It appears that most, if not all, of these people, including the plaintiff, own their own residences and some others occupy their residences as tenants.

It is in evidence that these people, including the plaintiff, sought to obtain in this pleasant suburb that peace and quiet that is becoming more and more difficult to obtain in our larger city. They were seeking to escape noise and turmoil. They were fleeing from and not to noise. That was their right and privilege under the law.

At the time the plaintiff acquired his home, in July, 1912, it was immediately in the rear of the defendants' premises upon which the defendants had erected a costly and beautiful building which he had occupied as a place of residence and for no other purpose. In fact, at the time the plaintiff acquired his residence the territory radiating from the houses of both the defendant and the plaintiff, for about a distance of about a mile, in all directions, was exclusively used for residence purposes. All the buildings, so far as the testimony shows and so far as the court has been directed to same, were erected or were in process of erection, for residence purposes only, and this condition seems to continue to the present time, with the single exception of the premises of the defendants. No business of a noise-making character or of a nature to disturb the peace and quiet of the suburban residences above referred to were established until about the middle of the year 1913, and this is the one herein complained of.

At this time the evidence discloses the defendants started with the erection of the building in the rear of this home, the building not being of a character to be used for residence purposes. The plaintiff and others made objection to the municipal authorities of the city of Norwood. The objectors were informed that the mere erection was not in violation of the laws relating to such matters. While it might not have been commendable on the part of the defendants, it was not condemnable, under the law, until and unless its use might make it so.

It is in evidence that knowledge of this objection was brought home to the defendants at about the time they started the erection of this factory building. Nevertheless, they proceeded and installed therein a 10 H. P. gasoline engine, a buzz saw, band saw,

1914.]

Stall v. Hillman.

rip saw, planers and other appliances for the making of stairs and stairways by machinery. The very nature of the business proposed to be carried on by the defendants was bound to cause unusual and disturbing noises not theretofore existing in this neighborhood, and while there may have been some conflict as to the effect upon the plaintiff, his family and his neighbors, due to the varying sensibilities of people, nevertheless the testimony shows by a great preponderance of its weight that the operation of this factory plant would and did cause violent and unusual noises, disturbing the peace and quiet of the plaintiff in the use of his home and depriving him of the enjoyment thereof, to which he was entitled under the law.

This new use of their premises by the defendants was entirely inconsistent with the use of the front part of his beautiful residence, and equally inconsistent with the use of his property by this plaintiff and all his neighbors within the radius above mentioned.

It is in evidence that the defendants did not erect this factory building under any proper assumption that their neighbors acquiesced in their right to do so, as being a reasonable use of their premises under the circumstances. On the contrary, their protests constituted a sufficient warning to them that their neighbors resented and would resist its use for such purpose.

Before starting to use their premises in this manner, the defendants should have given heed to that instinctive suggestion that arises in the minds of all thoughtful and neighborly men, that in order to have a good neighborhood, there must be good neighbors, having due regard to the rights of others and ever mindful that it is to the mutual interest of all to do nothing which would injure others. So well grounded is this instinctive suggestion as a rule of action for all right minded men, that for ages it has found expression in the maxim: "So use your own as not to injure another's property."

It is true that he who owns property or has the use of it, has certain rights which the law will protect and enforce, yet this property right is in very many instances and to a very great

extent limited and subject to the property and personal rights of others. Just where to draw this line is at all times a most difficult matter. There is no fixed standard or means of measurement which can be applied alike to all cases. Each case must depend largely upon the facts and circumstances pertaining to it.

This court has made an exhaustive examination of a large number of decisions not only of our own courts, but of the courts of other states, and also text-books compiled by learned authors, in order to have all possible light and learning on this case and the questions herein involved. After all, we may well accept the authority of our own Supreme Court laid down in the case of *Eller v. Koehler*, 68 Ohio St., page 51. In that case the court refers to the well known case of *Columbus Gas Company v. Freeland*, 12 Ohio St., 392, in which it quotes approvingly the language of this latter case wherein it is said:

Syl. 1. "What amount of annoyance or inconvenience will constitute a nuisance, being a question of degree, dependent on varying circumstances, can not be precisely defined."

In the *Eller* case, at page 55, the court say:

"In holding that what constitutes a nuisance can not be comprehended in an all-inclusive definition because of ever varying circumstances which may make that a nuisance in one case which is not one in another, this court merely embodied in terse phrase the universal experience of the courts."

On page 56 the court again says:

"Whether it be a cause of injury to real property or a case of personal annoyance or inconvenience, or of interference with the comfortable enjoyment of one's property, or whether the question be as to the existence of a nuisance or as to the extent of the alleged injury, or as to whether the defendant's act caused the injury and though the inquiry be before a chancellor or a jury, *the contiguity of the alleged nuisance to the plaintiff's property and the nature of the vicinage is always a pertinent circumstance to be considered.*

"For example, if one unnecessarily erects, maintains and operates a noisy, smoky machine shop or rolling mill in the midst

1914.]

Stall v. Hillman.

of a section of a city or town already wholly given up to residences, possibly many of them of elaborate design and great cost, there would be less excuse for the offender in so using his own property than if he had chosen a place which had been wholly or partly given up to trade and manufacture. *All that can be required of men who engage in lawful business is that they regard the fitness of locality.* In the residence sections of a city, business of no kind is desirable or welcome."

Let us reverse the situation somewhat. Suppose the defendants had not used their premises as they have, but maintained it strictly for residence purposes, and the plaintiff erected and conducted a saw mill in the rear of his premises, and within a few feet of the defendant's rear line, and some of their other neighbors also attempted to carry on noisemaking occupations, interfering with the defendants in the comfortable enjoyment of their home, it almost goes without saying that the defendants would seek relief in the courts and it surely would be granted to them.

The change from a residence section to a manufacturing or business section is generally slow in development. It comes gradually, and apparently at least by the acquiescence of those owning property in such sections and who might be interested in restraining this change if they were disposed to do so. It is only where there is a general conviction in a community that the progress of events can no longer be withstood that this change takes place, and it is only then that the law will countenance a transition of a community from residence uses to manufacturing purposes. *This condition might well be designated as a general acquiescence by property owners in the district to such a change.*

If the rule were otherwise the beautiful suburbs of our own city and of our sister city of Norwood, of which we are all justly proud, would soon disappear from our midst. *This seems to be the rule in force throughout our whole country.*

The court, after a somewhat exhaustive examination of this question, has been unable to find a single instance such as the one at bar, where the courts have refused to restrain the operation of a manufacturing plant in a strictly residence district.

The court has withheld a deliverance of this question in the hope, which has proven to be a vain one, that the defendants themselves would realize the manifest unfitness of this location for manufacturing purposes and would have voluntarily removed their plant to that portion of our thrifty neighboring city devoted almost, if not exclusively, to manufacturing uses. There remains no doubt in the mind of the court that the use of this plant for the purposes carried on therein is a nuisance causing great personal annoyance and inconvenience and interfering with the comfortable enjoyment by the plaintiff and his family of his home, as set forth in the petition. The weight of the testimony admits of no doubt as to this in the mind of this court.

An injunction will therefore be granted enjoining the defendants from continuing the use of the building erected on the rear part of their premises for the purposes for which it is now used by them. In order to give the defendants an opportunity to complete any contract and finish any material they may have on hand for the purpose of being manufactured into stairs and stairways, the enforcement of this injunction will be stayed for twenty days.

1914.]

Hockett v. Liquor License Board.

**VALIDITY OF AND MEANING OF THE HOME RULE AMENDMENT
TO THE OHIO CONSTITUTION.**

Common Pleas Court of Franklin County.

CHARLES S. HOCKETT, ACTING FOR HIMSELF AND FOR ALL OTHER
SIMILARLY SITUATED TAX-PAYERS IN FORTY-FIVE PROHIBI-
TION COUNTIES IN THE STATE OF OHIO, TOO NUMEROUS TO
MENTION, v. THE STATE LIQUOR LICENSE BOARD OF THE
STATE OF OHIO, AND CHARLES L. ALLEN, BYRON CLENDENING
AND J. H. SECREST, MEMBERS OF THE STATE LIQUOR LICEN-
SING BOARD OF THE STATE OF OHIO.

Decided, December, 1914.

*Constitutional Law—Validity of the Home Rule Amendment—Existing
Election Machinery Was Sufficient for Its Adoption—Function of
the Judiciary with Reference to Changes in the Organic Law—
Operation of the Initiative and Referendum—Injury to Thrift Not
Within the Provision Against Impairment of the Obligation of
Contracts—Bar of the Amendment Against a Certain Class of Legis-
lation Does Not Destroy the Republican Form of Government or
Violate the Welfare Clause of the Federal Constitution—Retroac-
tive Legislation.*

1. Disastrous results to business or trade, following ill-advised or illegally enacted law, can not be made the basis of a court proceeding for relief to either an individual citizen or the public in general.
2. But an allegation that the recent Home Rule Amendment was not adopted in the manner authorized by the Constitution or by the laws of the state presents a question so serious that the court in its discretion may permit a tax-payer to maintain an action to enjoin the State Licensing Board from taking action thereunder in contemplation of expenditures of public funds.
3. A constitutional amendment must be adopted in strict conformity to the method provided by the existing Constitution, and it is within the province of the judiciary for a court to inquire whether in the adoption of an amendment the provisions have been followed.
4. The Ohio Constitution has reserved to the people the power both to propose laws to the General Assembly and to propose amendments to the Constitution, and to adopt or reject either on a referendum vote.

5. The amendment of 1912 to Article II of the state Constitution became operative and in full force from its adoption with respect to all of its provisions, including the provision as to how future amendments to the Constitution shall be submitted and adopted, and as to those provisions the amendment was self-executing and required no further legislative enactment; and the fact that a method is provided for the submission of an amendment at a general election and for a vote thereon, together with the fact that the people did vote on the amendment restricting to a certain extent further legislation having reference to manufacture or sale of intoxicating liquors, is a sufficient warrant for a court to declare that it has become part of the organic law of the state, notwithstanding election machinery has not been provided for canvassing, counting and reporting the vote thereon.

6. The language of the Constitution definitely and distinctly was intended to appropriate the general state election machinery for the adoption or rejection of amendments to the Constitution proposed under its provisions.

Section 4785, General Code, must be presumed to have been in contemplation of both the framers of the constitutional amendments and the Legislature. Its provisions as well as those of the Constitution are sufficient to require the elections on amendments to be conducted according to law. Furthermore Section 5019, General Code, was specially amended to provide for election on referendum of laws and constitutional amendments, and is adequate for that purpose.

7. Elections belong to the political branch of government. Therefore a petition averring irregularities and illegalities in an election presents no case authorizing a court of equity to interfere by injunction against the acts resulting from such election; such petition presents no question of equitable jurisdiction whatever. *Link v. Karb*, 89 O. S., 21, followed and applied.

Adequate provision is made for the election machinery. The initiative and referendum amendments to the Constitution are self-executing and have been sufficiently supplemented by legislative enactment to carry them into effect.

8. The interpretation given by advocates or opponents of proposed amendments in a political campaign will not be followed by the courts merely because the amendment is thereafter adopted by the voters.
9. The Home Rule Amendment construed (see opinion).
10. The retroactive effect and operation of the amendment does not militate against its validity.
11. The tempermental change in the matter of thrift, which it is claimed will overtake the people upon the introduction of saloons in locali-

1914.]

Hockett v. Liquor License Board.

ties where they did not before exist, whereby ability to purchase will be impaired and property will depreciate in value, is not a matter which tends to impair the obligation of contracts within the meaning of the federal Constitution.

12. The bar which is raised by this amendment against the further enactment of laws restricting traffic in intoxicating liquors, is not in contravention of the republican form of government nor does it violate the welfare clause of the federal Constitution.

A. Jay Miller, H. B. Emerson, J. A. White, Howenstein & Houston, John E. West, Miller, Miller, Brady & Seeley, for plaintiffs.

Timothy S. Hogan, Attorney-General, and J. I. Boulger, contra.

KINKEAD, J.

Plaintiff for himself and all others similarly situated, brings this action as a citizen, a resident, an elector and a tax-payer in the city of Bellefontaine, Logan county, and state of Ohio. As such he avers he is concerned with the proper and legal administration of the offices and duties of all the state officers in the state. As an additional basis for his claim of right he alleges in substance that, relying upon the adoption of the previous fundamental and other liquor laws he greatly increased his business of selling pianos on credit, and thereby depended upon the thrift of the citizens to carry out their contractual relations with him free from the influence of saloons in the county. It is further alleged as ground for his right to maintain the action that the saloon contributes to the excessive use of intoxicating liquors, endangers the public health, public morals and public safety, and directly lessens the thrift of its citizens and impairs their capability to meet their contractual obligations.

Individually the plaintiff claims, as owner of certain personal and real property, that the earnings therefrom will be jeopardized and decreased as well as the value; that any illegal and improper act on the part of the defendants, permitting the establishment of saloons would jeopardize the earnings and savings arising from the thrift of the people, and the taxes plaintiff must pay to the state and its political subdivisions would be increased

and the earning power of the investments of plaintiff would be materially lessened.

The opinion and judgment of the court is that the claims alleged in support of the right to maintain the action as a citizen and tax-payer seem to relate to purely governmental rights and duties concerning which courts may not afford relief or redress. If disastrous results to business or trade follow from ill-advised, improper or even illegally enacted law, they can not be made the basis of action for relief to the individual citizen or the citizenship in general.

The grounds of the claim of right to prosecute this action would seem in a measure to disclose that it is sought to have the judiciary interfere with the power of the entire electorate of the state because an amendment to the Constitution has been passed which operates to the moral or material detriment of the citizenship. It must be conceded that the courts have no such power.

It appears, however, from the body of the complaint, that the real contention is, that the so-called home rule amendment to the Constitution was not adopted in a manner authorized either by the Constitution, or by the laws of the state. That presents a serious and momentous question, and if there is foundation for it, there ought to be some remedy afforded individuals, if recourse may not be had through the legal officers of the state. Mandamus and quo warranto are the remedies for redress of official misconduct, or the wrongful exercise of powers. These remedies are pursued by the legal officers of the government, although mandamus may be resorted to by individuals. It is said that there are serious objections against allowing mere interlopers to meddle with the affairs of the state, and this is not usually allowed, unless under peculiar circumstances when the public injury by its refusal will be serious. The Attorney-General is the adviser and representative of the state officials, and there may be no way of testing important legal questions involving expenditure of public money that might vitally affect citizens, electors and tax-payers.

In reference to the extraordinary remedies it is said in some jurisdictions that "the rule which rejects the intervention of

1914.]

Hockett v. Liquor License Board.

private complainants is one of discretion and not of law." See *Ayres v. Board*, 42 Mich., 422; *State, ex rel, v. Nash*, 66 O. S., 612.

The right of a tax-payer to maintain injunction against unlawful official misconduct on the part of state, county or municipal officers has been the recognized practice in cases where such misconduct may result in the expenditure of public money. And may the courts not appropriately exercise some discretion in extending the right to a tax-payer to bring such action even though he may be remotely affected? The rule has been adopted in *Green v. State Civil Service Commission*, 90 O. S., —, that:

"A tax-payer may maintain an action to enjoin public officers or a public commission from the commission of acts in excess of legal authority which contemplate the expenditure of public money."

This action is sustainable on this ground. If the contention of plaintiff be sound, the defendants would commit acts in excess of legal authority which would necessitate the expenditure of public money. It matters not how the public money be exacted, for it becomes public money without regard to the mode of collection, or by whom paid. The first claim of plaintiff is that:

"Sections 1a, 1b and 1g of Article II of the Constitution provide no method nor means for submitting the proposed amendment to the electors of the state or of counting or canvassing the vote thereon, or of ascertaining its approval or rejection;"

"That the act relating to certain proposed amendments found in 103 O. L., 724, 725, is limited to the election in November, 1913, and in no way applies to the election of November, 1914:

"That the power in Section 1g given to pass laws to facilitate the operation of Sections 1a and 1b of Article II has not been exercised for the submission of the home rule amendment, and the Secretary of State of Ohio was without authority to conduct said election of November 3d, 1914, on said amendment, and the deputy state supervisors of elections in the various counties of Ohio were without authority of law to certify returns of the votes cast for and against said proposed amendment."

The question naturally arises whether the judiciary has the right or power to declare an amendment to the Constitution rati-

fied or approved by a majority vote of the electors to be null and void, because adequate machinery has not been provided either by the Constitution or by the law for the proper conduct and ascertainment of the election.

Was the proposed amendment to the Constitution properly submitted according to the method or manner prescribed by the Constitution itself, or by the Constitution and laws passed by the Legislative branch to facilitate its submission?

It is to be conceded that the power which is inherent in the people must be exercised in a lawful manner; that the Constitution is paramount and supreme over all branches of government. If it prescribes the exact method in which the amendment shall be submitted, and defines positively the manner of its submission, such constitutional directions are mandatory on all departments of government; without strict compliance therewith, an amendment to the Constitution can not be validly adopted. Whether such amendment has been legally submitted or validly adopted depends then upon the fact of compliance or non-compliance with the constitutional directions as to how the same shall be adopted, and whether such compliance has in fact been had, must, in the nature of the case, be a judicial question. While it is not competent for courts to inquire into the validity of the Constitution and form of government under which they themselves exist, yet where the existing Constitution prescribes a method for its own amendment, to be valid the same must be adopted in strict conformity to that method; and it is the duty of the courts in a proper case to inquire whether, in the adoption of the amendment, the provisions of the existing Constitution have been observed, and if not, to declare the amendment invalid and of no effect. *Koehler v. Hill*, 60 Iowa, 543; *Statc, ex rel, v. Powell*, 77 Miss., 543 (48 L. R. A., 652); *Collier v. Frierson*, 24 Ala., 100, and other cases.

The provisions of the Constitution for its own amendment being mandatory, and to be strictly observed, it follows that failure to pursue its mandates has been regarded by some of the decisions as fatal to a proposed amendment, notwithstanding it may have been submitted to, ratified and approved by the people. The

1914.]

Hockett v. Liquor License Board.

constitutional provisions are binding upon the people themselves; it is held that they can not give legal effect to an amendment submitted in disregard of limitations imposed by the law—the Constitution—prescribed as a limitation on their own government. *Kadderly v. Portland*, 44 Ore., 118, and cases cited therein.

These rules have relation to the old methods and not to the “initiative and referendum.”

The inquiry here is whether adequate provision has been made either by the Constitution itself, or by its provisions supplemented by legislative enactment.

The Constitution by Article II, Section 1, has reserved to the people “the power to propose to the General Assembly laws and amendments to the Constitution.”

It has thus reserved two separate powers, one to propose laws to the General Assembly, second to propose amendments and to adopt or reject either laws or amendments to the Constitution on a referendum vote. It reserves power in the people to propose amendments to the Constitution independent of the General Assembly, and to adopt or reject the same at the polls.

The term “first aforesaid power,” used in Section 1a, means the power to propose both laws and amendments to the Constitution, which is reserved by the people and is designated as the “Initiative.”

The Constitution prescribes the manner in which either laws or amendments to the Constitution are to be initiated, viz., by petition, signed by a certain percentage of electors. To initiate an amendment to the Constitution, ten per centum of the electors is required. When a proper petition is signed, it is to be filed with the Secretary of State, duly verified, the full text of which is to be set forth in the petition.

Then it is required that “the Secretary of State shall submit for approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding or *general* election in any year occurring subsequent to ninety days after filing such petition. *General* election is designated in election laws as the state election, while the term *succeeding* reg-

ular election must have reference to the election of municipal, township and certain county officials, which election is held in every precinct of the state. Provision is made that the proposed amendment shall have printed across the top thereof: "Amendment to the Constitution Proposed by the Initiative Petition to be Submitted Directly to the Electors."

It is then provided that,

"Any proposed * * * amendment to the Constitution submitted to the electors as provided in Section 1a and Section 1b, if approved by a majority of the electors, voting thereon, shall take effect thirty days after the election at which it was approved and shall be published by the Secretary of State."

Provision is made for conflicting amendments submitted at the same time as to which shall be declared adopted according to the vote on each. It is required that:

"The Secretary of State shall cause to be printed the * * * proposed amendment to the Constitution, together with the arguments and explanations," etc.,

in the manner provided, and to distribute the same.

"Unless otherwise provided by law, the Secretary of State shall cause to be placed upon the ballots, the title to any such * * * proposed amendment to the Constitution, to be submitted. He shall also cause the ballots so to be printed as to permit an affirmative or negative vote upon each * * * proposed amendment to the Constitution. The style of * * * all constitutional amendments shall be: Be it Resolved by the People of the State of Ohio."

The basis for the required number of petitioners is fixed by the Constitution. Finally, it is provided:

"The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved."

"Self-executing" means that the amendments to Article II made in 1912, became operative and in full force from its adop-

1914.]

Hockett v. Liquor License Board.

tion in respect to all its provisions, providing how future adoption of amendments to the Constitution shall be submitted and adopted without further legislative enactment. Full and explicit provision was made by the self-executive amendment for the initiation, the submission, the vote, and all essentials excepting the minor details of the election machinery. The Secretary of State is designated as the officer to receive and cause proposed amendments to be placed upon the ballots. The time when an amendment shall take effect is fixed, and it is made the duty of the Secretary of State to publish the same when adopted.

Though no special provision is made in the Constitution concerning the qualification of electors, or the election machinery, the fact that a method for submission of an amendment at a general election and for a vote was made therein, together with the fact that the people did vote for the amendment involved in this case, and that it was carried, must be sufficient to warrant the judiciary, without anything else, in declaring that it has become part of the organic law, even if election machinery has not been fully provided for either by Constitution or statute. There is excellent precedent for such a view, in addition to the common sense of the proposition.

The Kansas case cited by the Attorney-General involved a prohibition amendment, and as in our state,

“There was a crowning effort of a brave and earnest people to free itself from the curse of intoxication, while on the other side the forces were claiming that such radical change in policy trespassed upon personal liberty and rights of property.”

It was observed by Mr. Justice Brewer that,

“Questions of policy are not questions for courts; they are wrought out and fought out in the Legislature and before the people. With courts, the single question is one of power. We make no laws; we change no constitutions; we inaugurate no policy. When a constitutional amendment has been submitted, the single inquiry for us is, whether it has received the sanction of popular approval in the manner prescribed by law.”

The question in constitutional prohibitory amendment, 24 Kan., 700, was as here:

“Does the fact that any officers assumed to conduct the election and canvass, bind any one to determine the result, unless such officers were by law authorized to so conduct and canvass? In short, is not the failure to name the officers and provide the machinery for the election such an omission as renders invalid any election *in fact held*, or any canvass and declaration of result *in fact made*?”

Here it is urged that no machinery at all was provided in the Constitution itself, or by law for the conduct of election, for transmission and canvass of votes, and for the pronouncement of the result.

It is claimed that:

“Until a general law is passed in accordance with the words of Section 1a ‘hereinafter provided,’ if the character and nature of the proposed amendments do not meet with the approval of the Legislature then in being, none can be submitted.” “Consequently,” it is argued, “that neither the home rule amendment nor the prohibition amendment have been legally submitted to the electors in November, 1914, and that no matter how the people voted it was all ‘without the pale of the law’ and the majority of the electors voting for either one of the proposed amendments could not make it valid and an integral part of our Constitution.”

The fact is there is nothing in the Constitution about the “election machinery.” It does provide, however, that the Secretary of state shall submit the proposed amendment at the *next succeeding regular or general election in any year occurring subsequent to ninety days after the filing of the petition.*

It is argued that an act “relating to certain proposed amendments to the Constitution of Ohio and the publication thereof” passed April 28, 1913, 103 O. L., 724, relates only to the election to be held on the first Tuesday after the first Monday of November, 1913. That is the fact, but that act was a mere temporary one for that year alone, so we are not the least concerned with it on the questions involved.

It is also contended that 103 O. L., 554, amending General Code, Section 5019, provides no manner for canvassing the votes or returns to the Secretary of State.

1914.]

Hockett v. Liquor License Board.

It is next contended that Section 4785 providing that:

“Except when otherwise provided by law all public elections in the state shall be conducted according to the provisions of this title,”

can be of no avail because Section 1a, of Article II when adopted in September, 1912, distinctly provided that the “manner” shall be as “hereinafter provided,” which, it is claimed, referred to future provisions of the Legislature or a further provision in the Constitution, neither of which has ever been made. It is claimed also that the provisions of the General Code on Elections do not furnish any “machinery” for the *counting* or the *reporting* of votes cast on “proposed amendments” nor for any *canvass* of such votes at all, although all other kinds of elections are specifically provided for.

The foregoing claims, made by counsel for plaintiff, are true in fact, except as to the deduction they make from Sections 4785 and 5019.

All the claims of counsel for plaintiff as to the alleged want of election machinery have now been fully stated. Properly comprehended and stated the question is whether the alleged failure to enact legislation *specifically* referring to elections on proposed constitutional amendments and providing for counting ballots, reporting and canvassing the same, subsequent to the adoption of the 1912 amendment to the Constitution, is fatal to the election, notwithstanding the fact that the present amendment was voted upon at a *general* election, and notwithstanding full and adequate provision is made for all the details of such *general* election, for casting and counting the votes, for transmission of all votes by the deputy state supervisors to the state supervisor, and for returns and abstracts of all votes and transmission to the Secretary of State and for the canvassing thereof.

Whatever foundation such claims may have (we think absolutely none) they are strikingly answered by the homespun and common sense reasoning of Mr. Justice Brewer in the Prohibitory Amendatory Amendment in 24 Kans., 700, which involved the precise claim made here. The rule must operate uniformly on “Wet” or “Dry” Amendment.

The court therefore quotes the opinion of Mr. Justice Brewer:

“And first, the election itself was authorized by law. It was not a mere volunteer proceeding. The proposition was put by legislative sanction before the people, who were invited to consider and act upon it. ‘The following proposition shall be submitted to the electors of the state for adoption or rejection.’ Both Constitution and statute name the time and the persons at which and to whom this proposition is submitted. And the statute further provides that the proposition shall be submitted ‘at the *general election*.’ This implies something more than the mere matter of time. The Constitution says ‘at which time.’ But the statute goes further: it does not read, at the time, or on the day of the general election, but at that election itself. For the purpose of voting upon and determining the question submitted, it thus refers to and appropriates the statutory machinery of the general election. Concede that this may technically be limited to the mere proceedings of election day and that the Constitution and statute together, prescribing the form of ballots, the parties entitled to vote, the time of election, and the election machinery, have exhausted their force at the close of the polls, and what then?

“Must not the court take judicial notice of the result? We are bound to know what the Constitution is, what the statutes are. We take judicial notice of them. No proof is required—none is proper * * * of course, we take judicial notice, without proof of all the laws of our own state * * * and in doing this, we take judicial notice of what our books of published law contain, of what the enrolled bills contain, of what the journals of the Legislature contain, and, indeed, of everything that is allowed to affect the validity of any law, or that is allowed to affect or modify its meaning in any respect whatever.

“Now, the Constitution provides that ‘if a majority of the electors voting on said amendments at said election shall adopt the amendments, the same shall become part of the Constitution.’ Suppose a majority did adopt, but no machinery is provided for ascertaining that fact, no one is authorized to canvass and proclaim the result, and no one in fact does so canvass and proclaim; must not the court nevertheless take judicial notice of the result? When the Constitution says that upon certain conditions an amendment is adopted, must we not take judicial notice of the happening of those conditions? It is not the election, and not the canvass, that works the change; and if we are bound to take notice ‘of everything that is allowed to affect the validity

1914.]

Hockett v. Liquor License Board.

of any law, must we not of everything affecting the fundamental as well as the statute law? And judicial notice does not depend on the actual knowledge of the judge or the extent of the personal labor and inquiry required. The justice of the peace in the most remote county in the northwest portion of the state, may never have seen a copy of the journal of either house, takes judicial notice of all things appearing in either journal, so far as they affect the validity of any law. When challenge is made, we must investigate and know. So, although it may seem extravagant, yet if the Legislature has failed to make provision for the canvass of any vote on a proposed constitutional amendment, and if in fact none be made, must not the courts take judicial notice of the actual vote and its result? It may be said if we take judicial notice of votes on one question, why not on all and what need of election contests? Let the court determine on its judicial knowledge. But we do not take judicial notice of them so far, and only so far, as they affect the validity of some published law. * * *

“The courts are to know what is and what is not the public law of the state; what is and what is not a part of the Constitution; and to that end, must take judicial notice of everything, near or remote, that determines such fact. This argument condensed is that: the courts take judicial notice of what is published law, statutory or constitutional. When a majority of the electors voting on an amendment at an election properly ordered, adopts it, then it becomes a part of the Constitution. So the Constitution itself says. The courts must judicially know whether such amendment has been adopted, and is in fact a part of the Constitution, and to that end, if need be, must take judicial notice of every ballot cast at that election.

“But second: Does not a fair reading, a reasonable construction of the resolution, make it broad enough to appropriate the entire election machinery, including all relating to canvass as well as to casting votes? It says that the proposition ‘shall be submitted to the electors of the state for adoption or rejection, at the general election to be held on the Tuesday succeeding’; and the second section prescribes the form of the ballot. This, as we have just considered, plainly authorizes the vote.

“Does it not also appropriate the whole election machinery?

“We have a general election law. It is a single statute, yet it covers all details of ordinary elections, names election boards, prescribes rules of election, provides for returns and canvass of all votes. * * * It is one election law of the state. It is a general election law. Now, when a proposition is submitted to

the people at a general election, without further words of designation, does it not mean that the proposition is to be decided in the manner prescribed by that general election law? It is an old and familiar doctrine that that which is within the spirit of the statute, though not within the letter, is a part of it; as well as that which is not within the spirit but within the letter, is not a part of it. If * * * it should be stated that a question had been submitted to the electors at a specific and named election, the universal understanding would be, not only that the votes were to be received, but also that they were to be counted, canvassed, and the result proclaimed; and all this would be implied from the simple statement in reference to the submission. Should not equal extent be given to the language used by the Legislature if, without such extent, its intended action fails? Of course, what the Legislature omits, the courts can not supply. But the largest latitude may, and should be given to the language used, in order to uphold, rather than defeat its action. Especially is this true, when otherwise, large interests fully considered, will fail. And more especially is this true, when upon the faith of such legislative action the people of the whole state have been stirred up and moved to express their judgment upon a matter understood to be before them for decision. * * * Nearly two years elapsed between the time the proposition passed the Legislature and the day of the popular vote. During this time this question was not forgotten. It was discussed in every household and at every meeting. The state was thoroughly canvassed; its merits and demerits were presented and supported by all possible argument. Pulpit, press and platform were full of it. It was assumed on all sides that the question was before the people for decision. There was not even a suggestion of any such defect in the form of submission as would defeat a popular decision. * * * There was not a suggestion from friend or foe. The contest was warm and active. After the contest was ended and the election over, the claim is for the first time made that after all there was nothing, in fact, before the people: that this whole canvass, excitement and struggle was simply a stupenduous farce, meaning nothing, accomplishing nothing. This is a government of the people, by the people, and for the people. This court has again and again recognized the doctrine lying at the foundation of popular governments, that in elections the will of the majority controls, and that mere irregularities or informalities in the conduct of an election are important to thwart the expressed will of such majority."

1914.]

Hockett v. Liquor License Board.

The court is of opinion that the claims of counsel are groundless, technical and fallacious. No court should found a judgment upon such contentions, in view of the specific provisions contained in the Constitution, and of the adequate provision for general election machinery.

The provisions of the Constitution are definite and certain in specifying how, who, when and to whom proposed amendments to the Constitution should be submitted and when and under what circumstances they should be considered to be adopted and to go into effect.

The truth is, as held by Justice Brewer in the Kansas case, that the language of the Constitution of Ohio clearly, definitely and distinctly was intended to appropriate the general state election machinery for the adoption or rejection of amendments to the Constitution proposed under its provisions. This is the reasonable and rational construction to be placed upon the language of Article II, Section 1a, that the proposed amendment shall be submitted "at the next succeeding regular or general election." The plain import and intent was that the amendment was to be submitted at the next *succeeding general election* provided by law, existing by law of the state at the time the amendment was written by the convention and adopted by the people.

The constitutional amendment of 1912 was self-executing as to all the material matters relating to the submission, the vote necessary to adopt amendments, and when they should become effective. Section 4785, G. C., must be presumed to have been in contemplation of both the framers of the constitutional amendments and the Legislature. Its provisions as well as those of the Constitution are sufficient to require the elections on amendments to be conducted according to law, and as will be subsequently pointed out, Section 5019 was specially amended to provide for elections on referendum of laws and constitutional amendments, and is adequate for that purpose.

The contention of counsel for plaintiff indicates that the claim is one of irregularity and illegality in the conduct of the election.

In *Link v. Karb*, 89 O. S., 21, it is held that elections belong to the political branch of the government; that a petition aver-

ring irregularities and illegalities in an election presents no case authorizing a court of equity to interfere by injunction against the acts resulting from such election; that such petition presents no question of equitable jurisdiction whatever.

An election was had on the amendment under constitutional authority, and the prayer is that it be adjudged that the election was illegal and a nullity because irregularly held.

For this reason plaintiff has no standing in court.

The Attorney-General has argued in effect that if the right of an elector to appeal to the court for the purpose of presenting the questions which are raised by the petition herein is to be recognized; that if we are to recognize his right to represent others similarly situated, and interested in the same way, the ordinary rule of estoppel should be applied to him and those whom he represents.

According to the doctrine enunciated by Mr. Justice Brewer the court may take judicial notice that an election was had, and that those attacking the measure in this action presented at the same election a conflicting proposed amendment for prohibition; it may take notice of the fact that they adopted the same means and machinery to submit their proposed amendment, as did those advocating the amendment here involved; it may take notice of the fact that the so-called "conflicting amendment" was defeated.

If the court be warranted in applying the ordinary rule of estoppel, it would be justified in concluding that plaintiff, and those whom he represents, are estopped from now taking the position that the machinery under which the Home Rule Amendment was adopted, is defective. The doctrine of estoppel applies to those who may raise the constitutionality of a law, but whether it should apply to those raising a question of the invalidity of an amendment to the Constitution, presents a novel question concerning which the court need not express an opinion, except to doubt its application.

ADEQUATE PROVISION IS MADE FOR THE ELECTION MACHINERY.

THE INITIATIVE AND REFERENDUM AMENDMENTS TO THE CONSTITUTION ARE SELF-EXECUTING AND HAVE BEEN SUFFICIENTLY SUPPLEMENTED BY LEGISLATIVE ENACTMENT TO CARRY THEM INTO EFFECT.

Sufficient reference has been made to the provisions of the Initiative and Referendum Amendments to the Constitution to show the self-executing character thereof.

Whether or not a constitutional provision is self-executing depends upon whether it is addressed to the courts or to the Legislature. Whether it was intended as a present declaration, complete in itself as a definite enactment, or whether it contemplates legislation to carry it into effect, must be determined from the language used and the character of the provision.

It is said in the case of *Tuttle v. National Bank of Republic*, 161 Ill., 502, that:

“Where it is apparent that a particular provision of the organic law shall go into immediate effect without ancillary legislation, and this can be determined by giving full force and effect to all its clauses relating to the same subject and the language is free from ambiguity, then it becomes the imperative duty of judicial tribunals to declare it self-executing; and where the provision is unambiguous and the purpose of the provision would be frustrated unless it be given immediate effect, it will be held self-executing.”

That the Initiative and Referendum Amendments were not intended to be and are not dormant and quiescent, awaiting legislative action to call them into life and being, become obvious from consideration of their provisions, and especially from the declaration in Section 1g that:

“That foregoing provisions of this section *shall be self-executing*, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers here reserved.”

While such a declaration might not be conclusive upon the courts upon the ultimate question, yet it shows the intent of the framers and is entitled to peculiar weight in its determination. These provisions are a departure, in a marked degree, from the usual and ordinary mandates of the organic law, in the minutia indulged in the very effort to make them complete, specific and self-executing, so as to put it beyond the power of legislative enactment to cripple or defeat the new power, with respect to which a majority of the framers and a large class of the electors were at the time greatly enthusiastic.

The self-executing features become obvious from a consideration of the excerpts previously given in this opinion.

Aside from the conclusive proof of the adoption of existing general legislation concerning regular and general elections manifested by the language of the amendment of 1912 and of 3475, General Code, we have Section 5019 which was subsequently enacted for the express purpose of acting upon the delegation of power to enact laws to facilitate the operation of the I. & R. Amendment.

Section 5019 provides:

“Section 5019. When an amendment to the Constitution is to be submitted to the electors for their approval or rejection, such amendment shall be so submitted on a separate ballot at the top of which shall be printed the words ‘Proposed Amendment to the Constitution,’ or, if more than one such amendment is submitted at the same election, such heading shall be ‘Proposed Amendments to the Constitution.’ Each amendment shall be stated thereon in language sufficient to clearly designate it. which statement shall be printed in a space defined by ruled lines with two squares to the left thereof, the upper of which shall contain the word ‘Yes,’ and the lower word ‘No.’ There shall be two similar blank squares one to the left of that containing the word ‘Yes’ and one to the left of that containing the word ‘No.’ Persons desiring to vote in favor of such amendment shall do so by making a cross mark in the blank square to the left of the word ‘Yes,’ and those desiring to vote against the same shall do so by making a cross mark in the blank square to the left of the word ‘No.’ More than one such amendment may be submitted on the same ballot. *The provisions of this title, so far as practicable, shall apply to the marking of ballots and the*

1914.]

Hockett v. Liquor License Board.

counting of votes upon any constitutional amendments so submitted. All such ballots shall be deposited in a separate ballot box."

Construing the constitutional provisions with the statute, it is pertinent to inquire what detail of power lies dormant which it is necessary to call into life by legislative enactment and which is essential to give the amendments full operation. The duty of submitting an amendment to the Constitution for the approval or rejection of the electors is, by the provisions of Section 1a, mandatory upon the Secretary of State, whenever the proper petition therefor is filed with him. If approved by a majority of the electors, it shall take effect thirty days after the election (Section 1b) "and shall be published by the Secretary of State." This mandate necessarily carries with it, by implication, the power to require the poll made by the election officers to be returned and declare the result. Indeed the publication required is, in effect, such declaration. But if any power in that regard be lacking in the constitutional provisions, it is supplied by the statute (Sec. 5019) to the effect that the provisions of the Title, Public Elections, being Title XIV of the General Code, shall, so far as practicable, apply to the "counting of votes upon any constitutional amendment." The Chapter XIV of the title in question relates to returns and abstracts, where may be found ample provision on the subject entirely applicable to such a vote.

Our Initiative and Referendum Amendments are in keeping with the modern ideas and methods of constitution making. In marked contrast with the early governmental charters, they are full of legislation in order that they may be self-executing.

THE CONSTRUCTION AND MEANING OF THE HOME RULE AMENDMENT.

By its terms it repeals all laws in contravention with its provisions.

It presents the enactment of any prohibitory law,

"in a subdivision of the state upon the option of the electors thereof, * * * which has force within a territory larger

than a municipal corporation or a township outside of a municipal corporation therein."

It is stated in argument that prior to the election on November 3d last many able attorneys, federal and state judges, held that the language of the amendment could be so construed, if adopted, that it would repeal all laws on the statute books that prohibited the liquor traffic in any degree, such as selling on Sunday, to minors, or to persons in the habit of becoming intoxicated, etc.; that it would also make permanently wet territory of all townships in which no municipal corporation was located, and would prevent the Legislature of the state from enacting any state-wide prohibitory law.

While the court would personally have much respect for the opinions of the eminent gentlemen of which "judicial notice" almost might be taken for the purposes of this opinion, still it is believed to be the law as expressed in *Hodges v. Dawdy* (Ark.), 149 S. W., 656, that:

"The interpretation given by the advocates of proposed amendments in a political campaign will not be followed by the courts merely because the amendment is thereafter adopted by the voters."

In the calm judicial consideration of the amendment following the fervid heat of political battle, there is little difficulty in coming to its true import and meaning.

It destroys the county as a unit for prohibitory laws;

It forbids prohibitory laws for an entire county;

It forbids prohibition in the state at large;

It forbids a local option law in a territory larger than a municipal corporation or township;

It does not prevent prohibition for the whole of a township if it has no municipality in it.

If a township has no municipality in it, a prohibitory law may be passed for the whole township. If it has one or more municipalities in it, a prohibitory law may be passed for all territory outside of the municipality or municipalities located therein.

1914.]

Hockett v. Liquor License Board.

The amendment does not forbid city, residential or municipal prohibition of village or city. Any residential portion of city or village, or the entire or whole of a village or city may have prohibition on local option vote.

The amendment does not, therefore, repeal any law except the Rose county local option law.

It does not repeal Sections 6119-6125, providing for local option in townships.

It does not repeal Section 6127 *et seq.*, providing for local option for municipalities.

It does not repeal local option in residence districts provided for in Sections 6140 *et seq.*

It does not repeal or affect, in the least, the Sunday closing law or any of the regulatory laws providing against the evils resulting from the sale of intoxicating liquors.

There is no reasonable ground for argument or contention to the contrary.

The home rule amendment, without any legislation whatsoever, changes the status of all of the forty-five prohibition counties, forbidding prohibition in them as a county unit. It authorizes the liquor license commission under existing law to appoint license commissioners in all such counties in any village, city, residential district therein, or in any township that may have previously voted prohibition, that is prior to the adoption of the home rule amendment, nor may licenses be granted to persons in territory hereafter voted dry under any of the local option laws not affected thereby.

The construction of the amendment does give it retroactive effect, and forbids the Legislature from passing any prohibitory law covering the county as a unit, or the state at large.

DOES THE RETROACTIVE EFFECT AND OPERATION MILITATE AGAINST ITS VALIDITY?

Are the retrospective provisions of the state and federal constitutions a limitation upon the right of the people of the states to amend their constitutions?

The constitutional provisions involved in this inquiry are:

State Constitution, Section 28, Article II:

"Sec. 28. The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts."

Federal Constitution, Section 10, Article I:

"Sec. 10. No state * * * shall * * * pass any * * * *ex post facto* law or law impairing the obligation of contracts."

The words "retrospective" and "retroactive" are synonymous. *Rairden v. Holden*, 15 Ohio St., 207.

The inhibition found in Section 28, Article II of the state Constitution, relates to laws and not to constitutional provisions. In adopting it the people placed no limitation upon their power to amend their Constitution. Every constitutional amendment that may be adopted changes to some extent the status and condition of a greater or less number of citizens. The logic of the plaintiff's contention is that so long as he continues in the piano business or continues to own stock in a building and loan association, the people of Ohio are precluded from making any change in their organic law and are forever bound to the Procrustean bed constructed by the framers of the Constitution of 1851. To state the proposition is to refute it.

The expression "*ex post facto laws*," used in the federal Constitution, relates to penal and criminal proceedings which impose punishments and forfeitures, and not to civil proceedings which affect private rights retrospectively. *In re Sawyer*, 124 U. S., 219.

The temperamental change in the attribute of thrift which will overtake the population of Bellefontaine upon the introduction of saloons, whereby their ability to buy or pay for pianos will be impaired and the depreciation which will thereby result in the values of real estate, thus affecting his investment in building and loan association stocks, will not operate, within the meaning of the federal Constitution, to impair the obligation of any of his contracts.

1914.]

Hockett v. Liquor License Board.

A lawful tax on a new subject or an increased tax on an old one, does not interfere with a contract or impair its obligation within the meaning of the Constitution, even though such taxation may increase the debt of one person and lessen the security of another.

It was held in the case of *Hay v. Hill*, 65 Cal., 383, as follows:

"A mortgage was executed in 1879. It contained no special covenant as to the payment of taxes. Subsequently, by a constitutional provision, the mortgagee was made primarily liable for taxes upon the mortgage interest. Where it was contended that as the note and mortgage were made before the constitutional provision went into effect, the provision could not be applied to previous taxes without infringing the Constitution of the United States, the court held that the obligation was not impaired."

DOES THE AMENDMENT DESTROY THE REPUBLICAN FORM OF GOVERNMENT?

It is contended that it prevents the Legislature of the state from enacting a law prohibiting the manufacture and sale of intoxicating liquors throughout the state, and that by so doing violates the welfare clause of the federal Constitution, together with Article XIV, Section 1.

Article IV, Section 4, provides:

"The United States shall guarantee to every state in the Union a republican form of government," etc.

A republican form of government means, of course, a government having the three distinct functions of government—legislative, executive and judicial.

The contention is that the so-called Home Rule Amendment is an abatement of the legislative department of government on the subject of prohibiting the manufacture and sale of intoxicating liquor throughout the state. In other words, that the amendment is a prohibition of prohibition by legislative enactment, and a surrender of the legislative department of government on that subject, hence in violation of the federal Constitution.

It is argued, and authorities are cited, that the supervision of the public health, and the public morals is a governmental power (*Stone v. Miss.*, 101 U. S., 814): that "no Legislature can bargain away the public health or the public morals; *that the people themselves* can not do it; that government is organized with a view to their preservation and can not divest itself of the power to provide for them." *Id.*

A republican form of government within the meaning of Article IV, Section 4, federal Constitution, is taken to mean and comprehend the kind of state governments existing at the time of the adoption of that Constitution. The Constitution of the federal government did not contemplate a change in existing forms of state governments, but such existing governments were accepted precisely as they were. "Thus we have," Chief Justice Waite, in *Minor v. Happersett*, 21 Wall., 175, says, "unmistakable evidence of what was republican in form within the meaning of that term as employed in the Constitution." But he says: "No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner, especially designated."

Judge McClain in his Constitutional Law holds that "it may well be contended that a republican form of government contemplates one by representative bodies, and the distribution of the powers of government among distinct and independent departments."

If the Home Rule Amendment was a proposed law within the Initiative and Referendum Amendment to the Constitution there might be some basis for the contention. While some contended in the infant days of the I. & R. that "a legislative body, so shorn of its customary and constitutional functions, can not be longer regarded as the representatives of the people; that the legislative body can not be halved, quartered nor in any way subdivided" (56 Cent. Law. J., 247), still it must be kept in mind that there is a marked distinction between the act of the people in reversing the power to propose amendments to the Constitution, to adopt or reject the same, instead of allowing the same to be proposed by the Legislature as formerly, and the reservation of the power to propose and adopt laws.

1914.]

Hockett v. Liquor License Board.

In *Kadderly v. Portland*, 44 Ore., 118, 144, the Supreme Court of that state held that the initiative and referendum for laws did not destroy nor materially curtail the authority of the legislative body.

When the Initiative and Referendum Amendment to the Constitution was brought before the Supreme Court of the United States, for the purpose of having it declared invalid as in violation of the guaranty of a republican form of government by Article IV, Section 4 of the federal Constitution, that court expressed its judgment that there was no judicial question involved that the controversy presented a matter purely political, committed to the legislative branch of the government of the United States; it fixed

“the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the proposition,”

such as is made in the case at bar concerning the violation of the constitutional guaranty of a republication form of government.

It is held in *Pacific States Telephone and Telegraph Co. v. Oregon*, 223 U. S., 118, that:

“The enforcement of the provision in Section 3, Article IV of the Constitution that the United States shall guarantee to every state a republican form of government, is of a political character and exclusively committed to Congress, and as such is beyond the jurisdiction of the courts.

“The provisions of Section 4 of Article IV of the Constitution do not authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to Congress.

“Under Section 4, Article IV of the Constitution it rests with Congress to decide what government is the established one in a state, and its decision is binding on every other department of the government, and can not be questioned by the judiciary. *Luther v. Borden*, 7 How., 1.

“A statute otherwise constitutional can not be attacked in the courts on the ground that it was adopted in pursuance of provisions in the constitutions of the state which render the form of government of the state unrepblican in form within the meaning of Section 4 of Article IV of the Constitution. The courts

have no jurisdiction of the question; it is for Congress to determine.

"Whether the adoption of provisions for the initiative and referendum in the Constitution of a state, such as those adopted in Oregon in 1902, so alter the form of government of the state as to make it no longer republican within the meaning of Section 4 of Article IV of the Constitution, is a purely political question over which the court has no jurisdiction."

The statement made in the opinion of the Supreme Court of the United States in *Stone v. Mississippi*, 101 U. S., 814, cited by counsel, to the effect that the people themselves can not bargain away the public health, presents an interesting topic though not difficult of solution.

The question whether the legislative body may take action "bargaining away the public health," is radically different from that whether the people themselves, the original source of all power, may do so.

The parallelism may be drawn from the fact that the Continentalists and the British nation may make their Hague Compacts, and their bargainings of neutrality, but when the gates of Hell are opened for war, no compact or bargain was sufficiently binding in the sight of God or Nation, to prevent the sweeping away or breaking of all compacts, agreements or rules of God or of humanity.

A fortiori, if the people themselves in whom resides the source of all power, decide to reverse the principles of the police power which have heretofore established by legislatures and the judiciary, the power to declare which having always heretofore been exercised by the legislative branch of government, as part of the inherent power of government, there is no power to prevent such action by the people themselves in the exercise of their power to make Constitutions, or laws, under the Initiative and Referendum, except by the adoption of another and radically different or contrary amendment or law, by legally authorized expression of the people at an election duly authorized and held.

The judiciary as an agency of government certainly can not be expected to nullify and set aside the will of the people on technical grounds by the exercise of a power higher than the source of its own. And there is nothing in the compact made

1914.]

Zepf & Co. v. Dye.

between the states as evidenced by the federal Constitution, that authorizes or empowers a state or federal court, or the federal Congress even, to override or nullify the voice of the people of a state, so long as they do not entirely destroy or impair the republican form of government guaranteed by the federal Constitution. And this a state does not do when the people thereof in the proper and legal exercise of the function of amending their Constitution adopt an amendment incorporating a rule of conduct into such Constitution, which does not amount to a total abrogation or destruction of a republican form of government.

This, it seems to the court, presents the precise situation, concerning the adoption of the Home Rule Amendment as part of the Constitution.

The court has disposed of all the questions made in this case, and the final conclusion must be that the judiciary is utterly powerless to furnish the relief prayed for by the petition.

Therefore the judgment is that the demurrer to the petition is sustained and the action is, therefore, ordered dismissed.

**STATUTE RELATING TO NECESSARIES NOT APPLICABLE TO
CLAIM OF A MERCHANDISE BROKER.**

Common Pleas Court of Hamilton County.

ZEPP & COMPANY V. SAM R. DYE.

Decided, August 19, 1913.

*Attachment and Garnishment—Goods May Fall Within the Class of
Necessaries—But Claim of Seller Not be Maintainable Thereunder.*

A claim by a merchandise broker, who has loaned his credit to one desiring to purchase goods by giving to such person an order on some merchant for the goods desired, and who never saw the goods himself, is not a claim for necessities within the meaning of Section 10253, General Code, notwithstanding the goods so purchased fall within that class.

William J. McCauley, for plaintiff.

Charles W. Spicer, contra.

GORMAN, J.

Appeal from justice of the peace.

This cause is heard on appeal from a judgment of J. B. Hannah, justice of the peace in and for Miami township. The action below was one to recover a money judgment for clothing and furniture claimed to have been sold by the plaintiff to the defendant. An attachment was issued and garnishment process served upon C. F. Adams Company, claiming that said company was indebted to the defendant and had moneys belonging to him and due, being his wages. A motion was made below to discharge the attachment on the ground that the claim of the plaintiff was not for necessities, and that being the ground upon which the attachment was issued, it was contended that the attachment must fall, if it appeared that the claim was not for necessities.

The evidence, consisting of affidavits and oral testimony and admissions of counsel, show that the plaintiff, Zepf & Company, are merchandise brokers, engaged in lending their credit to persons who desire to purchase goods, giving orders to the persons upon merchants in this city, where the holder of the order goes and secures the goods he desires. The amount of the purchases are charged to the persons to whom the orders are issued, and the merchant who delivers the goods to the holder of the order, charges Zepf & Company.

There is no question but that the goods purchased in this cause are necessities, but the goods were received from the Liberty Clothing Company, Fifth and Plum streets. The plaintiff never saw the goods. The plaintiff has no stock of goods on hand and does purely a brokerage business.

I am of the opinion that the claim of the plaintiffs is not one for necessities. The plaintiffs simply loan their credit to the defendant, and the case stands as though the plaintiffs had loaned the defendant money and charged it to him as money had and received. It certainly would not be claimed that a loan of money was necessary for the maintenance of the defendant as goods and merchandise bought.

Upon the authority of *Schaap v. Flick*, 14 N.P.(N.S.), 260, I am of the opinion that the motion before the justice should have been granted. The above authority is a decision by Judge Dickson, on identically the same state of facts as in the case at

1914.]

Gelger v. Brewing Co.

bar, and the reasoning of Judge Dickson in that case appears to me to be sound and logical.

My attention has been called to the case of *Zepf & Co. v. Kamp*, decided by Judge Geoghegan orally from the bench, in which it appears that he held in another case that the claim of this plaintiff, arising similar to the claim in the case at bar, was one for necessities. But the finding of Judge Geoghegan in that case would indicate that Zepf & Company were engaged in the business of selling merchandise on installment, household goods and clothing, and that the defendant, Kamp, sought to purchase these goods and that Zepf & Company not having the particular goods on hand, gave him, Kamp, an order and the goods were delivered to Kamp by the person to whom the order was directed, and charged by Zepf & Company to Kamp. It may be that on the state of the facts in the case before Judge Geoghegan, his decision was the correct one to render.

However that may be, I am of the opinion that the facts in that case can be distinguished from those in the case at bar, and that the reasons given by Judge Dickson in the case above cited are more persuasive in influencing me to hold that the motion to discharge this attachment is well taken and the same will be granted, and an order made transmitting the original papers to the justice of the peace with direction to sustain the motion.

**PROPER ALLEGATIONS UNDER THE WORKMEN'S
COMPENSATION ACT.**

Superior Court of Cincinnati.

ERNST GEIGER V. THE CHRISTIAN MOERLEIN BREWING COMPANY.
LOUIS KLUBER V. THE SMITH & MILLS CO.; TWO CASES.

Decided, June 1, 1914.

*Pleading—Facts Showing Applicability of Workmen's Compensation
Act—May be Properly Averred in an Action Thereunder.*

In an action brought by an employee under favor of the workmen's compensation act for injuries received in the course of his employment, it is proper for him to allege in his petition such facts as indicate the applicability of that act. An allegation, therefore, that

defendant employs five or more workmen and that he has not contributed to the state insurance fund, will not upon motion be struck from the petition.

OPPENHEIMER, J.

These cases now come before us upon motion to strike from the petitions the allegation that defendant employed five or more workmen or operatives regularly in the same business, and that defendant has not paid into the state insurance fund the premiums provided by the act which creates the state liability board of awards.

This question has frequently been passed upon before in this court, and it has invariably been held that the allegation was proper, and the motion has in each case been overruled. However, this rule was originally established in this court at the time when the cases of *Schaefer v. The Bickford Tool Co.*, 13 N. P. (N.S.), 553, and *Zoz v. The Lunkenheimer Co.*, 15 N. P. (N.S.), 575, were decided, and it has therefore been presumed that the rule grew out of the opinion that the workmen's compensation act created a liability beyond that which existed at common law. But since the opinion of Judge Pugh in the case of *Schaefer v. The Bickford Tool Company* has been expressly disapproved by the Court of Appeals of Mahoning County in the case of *Gerthung v. Stambaugh-Thompson Co.*, 18 C. C. (N.S.), 496, and since it now seems to be admitted that an employee's right to recover is not enlarged by the workmen's compensation act, but that its only effect is to deprive defendants who have not complied with its provisions of certain common law defenses, it is urged as a necessary result that such allegation in a petition should be held to be unnecessary, prejudicial and improper.

We do not believe that this conclusion is justified. These actions are brought under the workmen's compensation act of 1911 (102 O. L., 524; G. C., 1565-37 *et seq.*). The question of liability under this act, for an injury suffered in any particular case, depends first, on whether the defendant employs five or more workmen or operatives, and second, on whether he has contributed to the state insurance fund. If he employs less than five workmen, all the defenses of which he has not been deprived by the Norris act (G. C., Section 6243), are available to him. If

1914.]

Geiger v. Brewing Co.

he does employ more than five workmen, and has contributed to the state insurance fund, he is not liable in damages because of negligence alone, but can be held to respond only in the event that the injury complained of resulted from the willful act of the employer or his agent, or from his failure to comply with the law. In other words, if a plaintiff seeks to hold an employer under the workmen's compensation act of 1911, it would at first blush appear to be necessary to show that defendant employs five or more workmen, and that he has not contributed to the state fund.

It is contended, however, that it is sufficient for the plaintiff merely to allege the acts of negligence upon which he relies, and that if the defendant then pleads either the fellow-servant rule, contributory negligence or assumption of risk, the plaintiff may file a reply stating that defendant employs five or more workmen and has not contributed to the state insurance fund. But this throws into a reply that which would properly appear to be a necessary condition of his right to recover under the workmen's compensation act, so that it merely postpones until a reply is filed, the making of an allegation necessary to the cause of action itself.

We can, of course, conceive cases in which the making of such an allegation would be entirely unnecessary, for defendant might merely traverse the allegation of negligence without setting up either of the three common law defenses heretofore referred to, and no evidence bearing upon these three defenses might be introduced by defendant in the course of the trial. On the other hand, however, the petition might show upon its face contributory negligence, or the negligence of a fellow-servant, as the proximate cause of plaintiff's injury, in which case it would be demurrable, unless there were allegations indicating that the workmen's compensation act applied. In such cases plaintiff would have to plead the act in order to make his petition good as against such demurrer; and if we were to sustain a motion to strike such allegation from the petition, we would simply prepare the way for such demurrer and thus necessitate further pleading. Moreover in Ohio assumption of risk must be negatived in the petition, so that a demurrer might also be filed

against a petition which alleged facts indicating that plaintiff had accepted the risk of the injury of which he complains. In such case also, an allegation that the petition was filed under the workmen's compensation act would seem to be not only proper but necessary. In short, it would seem to us to be entirely proper for plaintiff to indicate in his petition that he brings suit under the workmen's compensation act, and that he relies upon its provisions because defendant, through whose negligence he was injured, employs five or more workmen and has not contributed to the state fund. This allegation can not, in our opinion, be any more prejudicial than an allegation that defendant was negligent, and as it ordinarily becomes necessary in any event to explain to the jury the applicability of the law to the particular state of facts, we do not see in what manner defendant can be injured thereby.

We realize that there has been much controversy upon this question of pleading. The court of common pleas of this county has in several cases held either that all reference to the workmen's compensation act should be stricken from the petition or that all statements should be eliminated therefrom except the statement that defendant employs five or more workmen (*Chamberlin v. The Lunkenheimer Co.*, Court Index, April 4, 1913; *Dierkes v. The M. Marcus Building Co.*, Court Index, December 10, 1913). But we believe that the majority of practitioners are of opinion that the allegations to which reference has been made are in many cases necessary, and that they should therefore be permitted. We believe that we are correct in stating that this is the opinion of the Industrial Commission of Ohio and the Attorney-General of the state, and until some court of higher authority has passed upon the question, we are content to follow the rule heretofore applied by this court in such cases.

1914.]

State ex rel v. Horner.

**CONSTRUCTION OF THE SALARY ACT WITH REFERENCE TO
FEES RECEIVED BY STATE OFFICERS IN
NATURALIZATION CASES.**

Common Pleas Court of Cuyahoga County.

STATE OF OHIO, EX REL CYRUS LOCHER, PROSECUTING ATTORNEY
OF CUYAHOGA COUNTY, v. CHARLES S. HORNER AND
THE BANKERS SURETY COMPANY.

Decided, September 22, 1914.

*Office and Officer—County Clerks Have No Title to Fees Earned in
Naturalization Cases—Must Account for Fees Collected by Virtue
of Federal Laws as Well as Under the Laws of the State.*

A county clerk is not entitled under the present Ohio salary law to retain as an emolument of his office one-half of the fees up to \$3,000 received for services in matters pertaining to naturalization but he must account to the state for such fees in the same manner as for fees received for services rendered under the laws of the state.

*Cyrus Locher and Fred W. Green, for plaintiff.
Goulder, Day, White, Garry & Duncan, contra.*

COLLISTER, J.

The relator files his petition against the defendants in two causes of action. It avers the relator is the duly elected, qualified and acting prosecuting attorney of Cuyahoga county; the defendant, Charles S. Horner, for the period commencing upon the first Monday in August, 1911, and continuing for two years thereafter, was the duly elected, qualified and acting clerk of the court of common pleas of said Cuyahoga county, Ohio; the defendant, the Bankers Surety Company, is a corporation organized and existing under the laws of the state of Ohio, and authorized to do business within the state of Ohio; that prior to entering upon the duties of his office as such clerk, said Horner executed his official bond in the penal sum of \$20,000, with

the Bankers Surety Company as surety thereon, which said bond and the surety thereon was duly approved by the board of commissioners of Cuyahoga county, and such approval endorsed upon said bond, and said bond duly filed with the treasurer of said county, a copy of which bond is attached to the petition, and is in words and figures following:

"KNOW ALL MEN BY THESE PRESENTS, that we, Charles S. Horner, as principal, and the Bankers Surety Company, of Cleveland, Ohio, as surety, are held and firmly bound unto the state of Ohio in the penal sum of \$20,000, for the payment of which well and truly to be made we do hereby jointly and severally bind ourselves, our heirs, executors, administrators and successors, firmly by these presents, as witnessed by our hands and seals hereunto affixed this eighth day of July, in the year of our Lord one thousand nine hundred and eleven.

"THE CONDITION of this obligation is such that, whereas, the said Charles S. Horner was, on the 8th day of November, in the year of our Lord one thousand nine hundred and ten, duly elected to the office of clerk of the court of common pleas of the county of Cuyahoga, Ohio, to hold said office for the term of two years, beginning on the first Monday of August next after his election and until his successor is chosen and qualified; now if the said Charles S. Horner shall enter and record all the orders, decrees, judgments and proceedings of the court of which he is by law the clerk, and faithfully and impartially perform the duties of said office, and pay over accordig to law all moneys which come into his hands by virtue of said office, then this obligation shall be void, otherwise to be and remain in full force and virtue.

(Seal.)

CHARLES S. HORNER.

"Attest

THE BANKERS SURETY COMPANY,

"S. W. WILKINSON,

by H. B. SPRAGUE, V. Prest.

"Asst. Secretary."

The petition then sets forth the relator's first cause of action as follows:

"FIRST CAUSE OF ACTION: By virtue of the provisions of an act of Congress enacted June 29, 1906 (Vol. 24 Statutes at Large, page 596) courts of common pleas in the state of Ohio are given jurisdiction to naturalize aliens, and clerks of courts of common pleas are required to perform certain duties in con-

1914.]

State ex rel v. Horner.

nection with the naturalization of aliens, and to charge, collect and account for certain fees for the performance of said services, as follows:

"1. For receiving and filing declaration of intention and issuing a duplicate thereof, \$1.

"2. For making, filing and docketing the petition of an alien for admission as a citizen of the United States, and for the final hearing thereon, \$2.

"3. For entering the final order and the issuance of a certificate of citizenship thereunder, if granted, \$2.

"It is further provided in said act that such clerk collecting such fees may retain one-half of the fees collected by him in such naturalization proceedings, up to the sum of \$3,000 in any one year, the balance of such fees being required to be accounted for and paid over to the United States Bureau of Immigration and Naturalization.

"For the period during which said Charles S. Horner was clerk of the court of common pleas in and for Cuyahoga county, as hereinbefore recited, said Charles S. Horner, as such clerk of the court of common pleas, and by virtue of said office, performed the services required to be performed by the clerk of the court of common pleas in the state of Ohio, under the provisions of said act of Congress, and collected for said service, in accordance with the provisions of said act, the following sums of money:

"For receiving and filing declarations of intention and issuing duplicates thereof, \$4,878.

"For making, filing and docketing petitions of aliens for admission as citizens of the United States, and for the final hearing thereon, \$4,876.

"For entering the final orders and the issuing of certificates of citizenship thereunder, \$4,876.

"Pursuant to the provisions of said act of Congress, portions of said fees so collected, aggregating the sum of \$8,630, were from time to time paid over to the Bureau of Immigration and Naturalization by said Charles S. Horner, and the balance of said fees, aggregating \$6,000, was retained by him.

"No part of said \$6,000, so retained by said Charles S. Horner, has been paid into the treasury of Cuyahoga county by him, but said entire sum has been illegally withheld therefrom, and there is now due and owing to the county of Cuyahoga from said Charles S. Horner, and from the Bankers Surety company as his bondsman, the sum of \$6,000, together with interest there-

on at the rate of 6 per cent. per annum upon the different portions of said sum from the dates at which said portions were payable to the treasury of the county."

The defendant, Charles S. Horner, files a general demurrer to that first cause of action. The defendant the Bankers Surety Company also files a general demurrer to that first cause of action. A hearing on said demurrers has been had, briefs filed in addition, and this opinion gives the court's reasons for its decision on these demurrers.

For many years back, until a comparatively recent period, county officers, including the clerk of the court, received their compensation from fees, percentages, costs, allowances and perquisites. Public attention became attracted to this method of compensation, and it became the public thought that such method was wrong in principle, and should be changed so that such officers would receive, for performing the duties of their respective offices, a stipulated, fixed annual salary. Such public thought became so general that the Legislature, in obedience to the public demand, enacted laws on the subject, now known in common parlance as "salary laws." Whether or not such laws did entirely change such compensation from the former "fee system," so-called, to a "salary system," is necessarily involved in deciding the question at issue.

In March, 1906, the Legislature passed an act entitled "an act to fix the salaries of probate judges, county auditors, county treasurers, county recorders, clerks of the court of common pleas, and sheriffs, and to provide for the employment and compensation of their clerks, deputies and assistants." By its terms, said act took effect January 1, 1907. Said act is found in the 98th volume of Ohio Laws, page 89.

On February 15, 1910, the General Code of Ohio became operative, in which Section 1 of the act of 1906 is found as Section 2977. Said Section 1 is carried into Page & Adams Annotated Ohio General Code as Section 2977. Section 2977 of the General Code, and the same of Page & Adams Annotated Ohio General Code, are identical in language, and read as follows:

1914.]

State ex rel v. Horner.

“Section 2977. All the fees, costs, percentages, penalties, allowances and other perquisites collected or received by law as compensation for services by a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be so received and collected for the sole use of the treasury of the county in which they are elected and shall be held as public moneys belonging to such county, and accounted for and paid over as such, as hereinafter provided.”

Said Section 1 of the act of 1906 reads as follows:

Section 1. “All the fees, costs, percentages, penalties, allowances, and all other perquisites of whatever kind which by law may now be collected or received as compensation for services by any county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, shall be received and collected by all of said officers and each of them for the sole use of the treasurer of the county in which they are collected, and shall be held as public moneys belonging to said county, and accounted for and paid over as such in the manner hereinafter provided.”

While the language of the original act differs in some respects from that of said Section 2977, I think the meaning is the same.

At the time said Section 1 was enacted there was also enacted Section 5 of the same, which finds a place in the General Code and in Page & Adams Annotated Ohio General Code as Section 2982, and reads as follows:

“Section 2982. Each of such officers shall keep full and regular accounts of all official fees, costs, percentages, penalties, allowances or other perquisites charged or collected by him, and such accounts shall be records of the offices, shall belong to the county, and shall be transmitted by such officer to his successor in office. At all times such accounts shall be subject to the examination of the county commissioners, the judge or judges of the court of common pleas, or any person appointed for that purpose by the judge or judges, or of any person authorized by law to make such examination, or of any other person.”

At the time said Sections 1 and 5 were enacted, there were enacted Sections 11, 12, 13, 14 and 15, which sections find a place in Page & Adams Annotated Ohio General Code as Sec-

tions 2989, 2990, 2991, 2992 and 2993. Said sections read as follows:

"Section 2989. Each county officer herein named shall receive out of the general county fund the annual salary herein-after provided, payable monthly upon warrant of the county auditor.

"Section 2990. Each auditor shall receive * * *.

"Section 2991. Each treasurer shall receive * * *.

"Section 2992. Each probate judge shall receive * * *.

"Section 2993. Each clerk shall receive eighty-five dollars for each full one thousand of the first fifteen thousand of the population of the county, as shown by the last federal census next preceding his election; sixty dollars per thousand for each full one thousand of the second fifteen thousand of such population of the county; fifty dollars per thousand for each full one thousand of the third fifteen thousand of such population of the county; forty dollars per thousand for each full one thousand of the fourth fifteen thousand of such population of the county; thirty dollars per thousand for each full one thousand of the fifth fifteen thousand of such population of the county; twenty dollars per thousand for each full one thousand of the sixth fifteen thousand of such population of the county; and five dollars per thousand for each full one thousand of such population of the county, in excess of ninety thousand."

Said Section 2993 is substantially the same, and exactly the same in principle, as is Section 15 of the act of 1906.

At the time said Sections 1 and 5 were enacted, there was enacted Section 18, which section finds a place in the General Code and in Page & Adams Annotated Ohio General Code at Section 2996, which reads as follows:

"Section 2996. Such salaries shall be instead of all fees, costs, penalties, percentages, allowances and all other perquisites of whatever kind which any of such officials may collect and receive, provided that in no case shall the annual salary paid to any such officer exceed six thousand dollars."

The language of said Section 18 and Section 2997 is substantially the same, and the meaning is precisely the same.

1914.]

State ex rel v. Horner.

The original act, Section 18, provides,—“and said salaries shall be *in lieu* of all fees,” etc., and in Section 2996 the language is “such salaries shall be *instead* of all fees,” etc. There is no difference between the meaning of the words “in lieu of” and “instead of.” The definition of “instead” in the Century Dictionary and Cyclopedia is as follows: “in the stead; in place or room; hence in equivalence or substitution.” The same authority defines “lieu” as follows: “place, room, stead; now only the phrase *in lieu of*, which is equivalent to *instead of*.”

The cause of action is based upon the fact that the defendant Charles S. Horner, as clerk, acting under and by virtue of an act of Congress enacted June 29, 1906, performed certain duties in connection with the naturalization of aliens, and charged and collected certain fees for the performance of said services, and after paying over to the Bureau of Immigration and Naturalization of the United States the sum of \$8,630, received from such source, retained a balance so received in the sum of \$6,000, which he claims he has a right to retain as his own, and which the relator claims belongs to the treasury of the county.

The defendant Horner claims he is authorized to retain such fees as his own by virtue of the reading of the Ohio salary law (in a particular to be hereafter noted), and the reading of the United States naturalization act. Said naturalization act is found in Page & Adams Annotated Ohio General Code, Vol. 6, page 1307, and is known as the act of the Fifty-Ninth Congress passed in 1906, and is entitled, “An act to establish a bureau of immigration and naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States.”

The sections of said act which need to be noted here are Sections 3, 5 and 13, reading as follows:

“Section 3. That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts: United States circuit and district courts now existing, or which may hereafter be established by Congress in any state; United States district courts for the territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska,

the Supreme Court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any state or territory now existing, or which may hereafter be created, having a seal, a clerk and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited. That the naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts.

"The courts herein specified shall, upon the requisition of the clerks of such courts, be furnished from time to time by the bureau of immigration and naturalization with such blank forms as may be required in the naturalization of aliens, and all certificates of naturalization shall be consecutively numbered and printed on safety paper furnished by said bureau.

"Section 5. That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned.

"Section 13. That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding:

"For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar.

"For making, filing and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

"The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the bureau of immigration and

1914.]

State ex rel v. Horner.

naturalization, and paid over to such bureau within thirty days from the close of each quarter in each and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the department of commerce and labor, who shall thereupon deposit them in the treasury of the United States, rendering an account therefor quarterly to the auditor for the state and other departments, and the said disbursing clerk shall be held responsible under his bond for said fees so received.

"In addition to the fees herein required, the petitioner shall, upon the filing of his petition to become a citizen of the United States, deposit with and pay to the clerk of the court a sum of money sufficient to cover the expenses of subpoenaing and paying the legal fees of any witnesses for whom he may request a subpoena, and upon the final discharge of such witnesses, they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such clerk for such purpose, and the residue, if any, shall be returned by the clerk to the petitioner: Provided, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said bureau as in case of other fees to which the United States may be entitled under the provisions of this act.

"The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the secretary of commerce and labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said secretary the business of such clerk warrants such allowance."

In part the defendant Horner bases his claim to retain the naturalization fees as his own upon the words "collected or received by law," found in Section 2977, he claiming the words

“by law” mean by the *laws of the State of Ohio*; and inasmuch as the fees in controversy are earned by virtue of a law of the United States, such fees do not come under and are not disposed of by Ohio salary law, and are “*ultra*” such law.

This claim requires a construction of the Ohio salary law, so-called.

“The office of construction, when a statute is the subject of it, is to ascertain the legislative will. * * * ‘The intention of the law-makers may be collected from the cause or necessity of the act, and statutes are sometimes construed contrary to the literal meaning of the words. * * * The letter is sometime restrained, sometimes enlarged, and sometimes the construction is contrary to the letter.’ *Burgett v. Burgett*, 1 Ohio, 480.”

Section 2977 must be read and construed in connection with Sections 2982 and 2996. Section 2996 says:

“Such salaries shall be *instead of all* fees, penalties, percentages, allowances, and all other perquisites of whatsoever kind which any of said officials may collect and receive, provided in no case shall the annual salary paid to any such officers exceed six thousand dollars.”

From what has been said before on this subject of changing the compensation from a fee basis to a salary basis, and keeping in mind the rule of construction hereinbefore outlined, and gathering the meaning of the law on the subject from a reading of all the sections on the subject, I feel the contention of the defendant can not, by any provision of the Ohio laws, be maintained. My view on this subject is, in my opinion, strengthened by a reading of the case of *State, ex rel, v. Kennedy et al*, decided by the Supreme Court of Ohio on March 17, 1914. The construction of the sections of the General Code above was before the court in that case. The syllabus of that case reads as follows:

“1. The salary law, Sections 1292-11 to 1298, Revised Statutes (now Sections 2977 to 3004, General Code), which commands that the county auditor shall receive as public money

1914.]

State ex rel v. Horner.

for the sole use of the county, and pay into the county treasury quarterly, all fees, costs, percentages, penalties, allowances and perquisites of whatever kind collected by his office as compensation for services, and that such officer shall receive out of the general county fund, a designated annual salary, which shall be instead of such fees, etc., and all other perquisites which such officer may collect, forbids the recorder to retain for his own use and benefit any compensation awarded him by the county commissioners for making general indexes under favor of Sections 1154 and 1158, Revised Statutes (modified in Sections 2768 and 2780, General Code).

“A county recorder who fails to pay over to the county treasurer, and appropriates to his own use, any money so collected and received by him, is liable jointly upon his bond for the recovery of the money so retained, with interest from the end of the quarter in which such funds were collected.”

The opinion is too voluminous to insert in full, so I content myself with quoting the following therefrom:

“But the defendants quote from Sections 2977 and 3000, and argue that these sections prescribe determinate charges required by law to be collected as fees from patrons of the office in the regular and ordinary course of business, which properly go to the accumulated ‘fee fund’ turned into the treasury, whereas the making of general indexes is extra work, and the compensation thereof is not determined by law, but is a variable perquisite allowed by the commissioners which the statute authorizes him to draw out of the treasury for his personal benefit. And they contend that it is absurd to say that the one statute allows him to draw the money out and the other requires him immediately to pay it back into the treasury. The simple answer to this contention is, that the later statute commands that all fees, allowances and other prequisites of the office granted by the former statute as the recompense of service in that office shall be collected by the officer as formerly, without remission or diminution, and by him paid into the treasury, and *in lieu thereof* he shall receive an annual salary. This accumulation of fees, allowances, prequisites, etc., in the treasury, becomes a fund for the payment for such assistants in his office as may be needful to the proper discharge of its duties.

“This rational scheme was adopted as a convenient method of transition from the fee system to the salary system, without

disturbing or diminishing the revenues of the office, which now go to the public treasury. The criticism which the defendants make upon the new system is essentially an animadversion upon the legislative policy of these statutes and nothing more. We have naught to do with that policy but to declare and enforce it. We can not modify and cripple it, under the guise of interpretation, to appease the defendant's notions of its unreason and unfairness, however wise or otherwise the defendants may be in such matters. Statutes may be cut and shuffled and rearranged so as to appear incongruous, but this is not the proper method of legal construction. We must read them as they are phrased and arranged by the Legislature. Some of the statutes brought under review in this case are found under the chapter entitled 'County Recorder,' defining the term revenues and duties of the office; others have been placed in the chapter entitled 'Salaries of County Officers.' The same arrangement is pursued in the General Code. The statute defining the salary system is later than the statute prescribing the schedule of fees. If there is any intrinsic conflict, the latter enactment would prevail, and the provisions regarding fees, compensation and allowances would give way to expression of legislative intent in the statute prescribing salaries. But a comprehensive view of the two chapters reveals a harmonious and consistent legislative plan which calls for no textual criticism or legal construction. The language needs no interpretation, because it is simple and positive and its meaning is plain, namely, the county officers shall derive no other emolument from their offices than the definite salary prescribed by law."

It remains to see whether the act of Congress of 1906 gives the clerk, as his own, the fees in naturalization cases.

Section 3 of the act "confers" jurisdiction on courts of common pleas in naturalization.

Section 5 provides for the posting of notices in the office of the clerk of the name, etc., of the alien, and provides for the issuing of subpoenas for witnesses.

Section 13 of the act provides what fees shall be charged, collected and accounted for.

The clerk is put to no expense, except for extra clerk hire, and that is paid from the fees; he does his work in a court house furnished by the county; the blanks are furnished by the

1914.]

State ex rel v. Horner.

United States; the judge hearing the case gets no extra compensation by reason of sitting in naturalization cases.

Section 13 reads:

“That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect and account for the following fees in each proceeding.” * * *

Can it be a fair construction to say that the United States government undertook to regulate the domestic affairs of the states, and to enact a law in variance with the public policy of any of the states? Or would it not be fairer to say that all the United States undertook to mean was, that it prescribes what fees may be charged and collected by the clerk, and that he must account for such part thereof as is not turned over to the Bureau of Immigration and Naturalization according to the laws of the various states? That the United States intended that in a state where the clerk is paid by fees, he gets the fees on naturalization cases, and in a state where the clerk is paid by salary, that he shall receive the fees as clerk and account for them to the proper public officer, according to the laws of the state putting him on a salary basis.

This construction seems to me to be the proper one, and it seems to me that this construction is borne out by the case of *Harry I. Mulcrevy and Fidelity & Deposit Company of Maryland v. City and County of San Francisco*, decided by the Supreme Court of the United States on January 5, 1913. Justice McKenna delivered the opinion of the court in the case, and says:

“Action brought in the superior court of the city and county of San Francisco against plaintiffs in error to recover from them the sum of \$2,972, with interest from certain dates, received by plaintiff in error Mulcrevy in his official capacity as county clerk and *ex-officio* clerk of the Superior Court of the City and County of San Francisco in certain naturalization proceedings. Judgment was rendered on the pleadings against plaintiff in error. It was affirmed on appeal.

“Mulcrevy was elected county clerk of the city and county of San Francisco at the November election, 1905, for the term

of two years commencing January 8, 1906. He duly filed his official bond with plaintiff in error, the Fidelity & Deposit Company of Maryland, his surety, which was conditioned that he should faithfully perform all official duties which were then or thereafter might be imposed upon him by law, ordinances, or the charter of the city and county. His salary was fixed by the charter at the sum of \$4,000 and it was provided as follows: 'The salaries provided in this charter shall be in full compensation for all services rendered, and every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county of San Francisco within twenty-four hours after the receipt of the same.'

"By his election Mulcrevy became *ex-officio* the clerk of the superior court. After he had entered upon the discharge of his duties, on the 29th of June, 1906, Congress passed an act entitled 'An act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States.' Jurisdiction in naturalization proceedings was conferred by the act on the federal courts and certain state courts, and the duties of the clerks were set forth. Fees were prescribed and it was provided that the clerks of the courts collecting them were authorized to retain one-half thereof, the other half to be accounted for in their quarterly accounts which they were required to make to the Bureau of Immigration and Naturalization. The amount retained by the clerk, however, it was provided should not exceed in any one fiscal year the sum of \$3,000. If fees in excess of \$6,000 be collected in any one year the clerk might be allowed by the Secretary of Commerce and Labor additional compensation for additional clerical assistance out of the moneys received by the United States.

"Under the provisions of the act as clerk of the superior court in naturalization proceedings, Mulcrevy collected \$5,944 and accounted for one-half thereof as required by the act. The other half he kept for himself, his contention being that it was intended for himself by the act of Congress as pay for his extra work and clerical assistance, the fees not having been received by him in his official capacity, but merely as an agent designated by the act of Congress to perform services in naturalization proceedings.

"It appears from the opinion of the district court of appeal that the total salary list fixed and allowed to Mulcrevy's office

1914.]

State ex rel v. Horner.

amounts to \$58,600. And it is provided by the charter that when an officer shall require additional deputies, clerks or employees the same may be allowed by supervisors if upon investigation the mayor determines the same to be necessary. * * *

“On the merits, the case presents no difficulty. It involves only the construction of the act of Congress already referred to above. We accept the state court’s construction of the charter of the city and county of San Francisco. Indeed, its clearness leaves no room for construction. The salary it provides is declared to be ‘in full compensation for all services rendered.’ And it is provided that ‘every officer shall pay all moneys coming into his hands as such officer, no matter from what source derived or received, into the treasury of the city and county.’ The provisions are complete and comprehensive and express Mulcrevy’s contract with the city, the performance of which his office imposed upon him; and, of course, the fees received by him in naturalization proceedings, because he was clerk of the superior court, were in compensation for official acts, not personal acts.

“But it is contended by plaintiff in error that the fees having been received officially is not of importance; that nevertheless he acted as the representative of the United States in execution of the policies of the United States and being by the act of Congress invested with his powers he is entitled for himself to the compensation prescribed by the act for their execution, without any liability to account for them in the city. The last proposition, however, does not follow from the others, and the others are but confusing. If it be granted that he was made an agent of the National Government, his relations to the city were not thereby changed. He was still its officer, receiving fees because he was, not earning them otherwise or receiving them otherwise, but under compact with the city to pay them into the city treasury within twenty-four hours after their receipt.

“Under the contention of plaintiffs in error, a rather curious situation is presented. Mulcrevy was elected to an office constituted by the municipality under the authority of the state. He was given a fixed salary of \$4,000 with the express limitation that it should be his complete compensation. He agreed that all other moneys received by him officially should be paid into the treasury of the city. He was given office accommodations, clerks to assist him, and yet contends that notwithstanding such equipment and assistance, notwithstanding his compact, he may retain part of the revenues of his office as fees for his own per-

sonal use. We can not yield to the contention. Nor do we think the act of Congress compels it. The act does not purport to deal with the relations of a state officer with the state. To so construe it might raise serious questions of power, and such questions are always to be avoided. We do not have to go to such lengths. The act is entirely satisfied without putting the officers of a state in antagonism to the laws of the state—the laws which give them their official status. It is easily construed and its purpose entirely accomplished by requiring an accounting of one-half of the fees to the United States, leaving the other half to whatever disposition may be provided by the state law. Counsel cite some state decisions which have construed the act of Congress as giving a special agency to the clerks of the state courts and as receiving their powers and rights from the national enactment. The reports of the Department of Commerce and Labor are quoted from, which, it is contended, exhibit by their statistics and recommendations the necessity of national control. State decisions expressing a contrary view are frankly cited. This contrariety of opinion we need not further exhibit by a review of the cases. We have expressed our construction of the act, and it is entirely consonant with the purpose of the act and national control over naturalization. Judgment affirmed.”

It follows that the demurrer filed by Charles S. Horner must be and is overruled; and the rights of the Bankers Surety Company being no different from those of its principal, its demurrer is overruled.

1924.]

Brunet v. Paper Box Co.

**A PLEADING IS NOT VITIATED BY THE NAME
GIVEN TO IT.**

Superior Court of Cincinnati.

ANNA BRUNET V. THE HOLDEN PAPER BOX COMPANY; AND FRANK
P. J. BRUNET, AN INFANT, V. THE HOLDEN PAPER BOX
COMPANY.

Decided, September 5, 1914.

*Recoupment—Not Known to the Common Law—But is in Effect a
Counter-Claim—Right of, Has Been Extended in Modern Practice—
Pleading and the Designation Given to a Claim.*

The Code of Civil Procedure does not provide for that form of pleading known as "recoupment," but instead employs the term "counter-claim," which includes both recoupment and set-off. However, recoupment still exists in fact, and if properly pleaded, will not be struck from an answer merely because it is designated as a "recoupment," and not as a "counter-claim."

*Littleford, James, Ballard & Frost, for plaintiffs.
Geoffrey Goldsmith, contra.*

OPPENHEIMER, J.

Opinion on motion to strike recoupment from answers.

It appears from the petitions in these cases that on May 8th, 1913, Frank Brunet, a minor aged 14 years, was employed by defendant company to operate a cutting machine and that while so engaged he was, on the following day, injured through defendant's negligence. Accordingly he asks damages in the sum of \$2,000, and his mother Anna Brunet seeks to recover the sum of \$1,000 for the loss of his services. In each case defendant files a pleading which is designated as an "Answer and Recoupment." The "answer" contains a categorical denial of plaintiff's several charges of negligence, and asks for a dismissal. Then follows a "recoupment" in which it is alleged that Frank Brunet secured his employment by fraudulently representing that he was 18 years of age, which representation was participated in by his mother; that defendant then carried insurance

which covered any loss which it might suffer by reason of bodily injuries suffered by any employee, but that the policy of insurance did not cover an accident to anyone employed contrary to law. Defendant further alleges that by reason of plaintiffs' misrepresentation, it was induced to employ Frank Burnet contrary to law, and was thus deprived of the protection of its policy of insurance in this case. Accordingly defendant asks that if it shall be found that either plaintiff is entitled to a verdict, it may be permitted to recover, by way of recoupment for the fraud practiced upon it, the sum which might otherwise be awarded against it. Plaintiffs now file motions to strike out the entire "recoupment" from defendant's pleadings, upon the ground that it is "surplusage and redundant." In support of this motion plaintiffs urge that no such pleadings as a "recoupment" is recognized by our Code of Civil Procedure, citing Sections 11302-11319 inclusive of the General Code. This raises the sole question which is now presented for our consideration, viz., whether under our system of pleading recoupment is proper and permissible. In other words, we are now to concern ourselves, not with the *substance*, but with the *form* of the pleading filed by defendant.

In all probability recoupment was not originally recognized in pleading at common law. It was in the nature of an innovation, and was designed to enable litigants to settle in one action all claims growing out of the same transaction. But the remedy was of such limited application and so trammelled by technicalities that it was of but little use, and for a time the term became obsolete though the principle was retained. In more recent practice, however, the right of recoupment has been considerably extended, though the circumstances under which it may be exercised are not definitely determined. It may now be defined as "the act of rebating * * * a part of a claim upon which one is sued by means of a legal or equitable right resulting from a counter-claim arising out of the same transaction. It is the right of defendant, in the same action, to claim damages from plaintiff, either because he has not complied with some cross obligation of the contract upon which he sues, or because he has

1914.]

Brunet v. Paper Box Co.

violated some duty which the law imposed upon him in the making or performance of that contract." Bouvier's Law Dictionary; 34 Cyc., 623.

When the common law system of pleading was generally abandoned in this country, and codes of procedure were adopted, recoupment was, in some of the states, made statutory. In other states it is no longer specifically mentioned as a form of pleading. But the right which had previously been asserted as a recoupment—the right to recover from plaintiff the loss sustained by reason of his violation of a duty imposed by law with reference to the transaction involved in the suit—still remained, and was permitted under the designation of "counter-claim."

Before the adoption of the code, the counter-claim was unknown (*Bloom v. Lehman*, 27 Ark., 489; *Valentine v. Hallman*, 63 N. C., 475). It may be defined as "a claim presented by a defendant in opposition to or deduction from the claim of plaintiff" (34 Cyc., 629). It includes both recoupment and set-off, though broader and more comprehensive than either. It embraces all sorts of claims which a defendant may have against a plaintiff in the nature of a cross-action or demand, or for which a cross or separate action would lie, within the limitations contained in the code. *Wolf v. H.*, 13 How. Pr. (N. Y.), 84. Counter-claim, then, is a generic term, and recoupment is the species. Every recoupment is in the nature of a counter-claim, though a counter-claim need not necessarily be a technical recoupment. The nature of the counter-claim may be such as to justify a recovery by the defendant from the plaintiff of the excess of his demand, while a recoupment is limited to the amount of plaintiff's demand.

Therefore while it is true that our code does not in terms provide for a pleading known as a recoupment, yet that form of pleading which is designated as a counter-claim includes recoupment. We can therefore see no inherent objection to the employment of the latter term, for even though that term is used, the pleading is in strict legal effect a counter-claim by defendant against plaintiff. In other words, we do not think that a pleading should be vitiated merely because counsel call a spade

a spade rather than an agricultural implement. If anything, the term is more exact, and its use is therefore to be commended as indicating the precise nature of the pleader's contention.

It is to be understood, as we have heretofore indicated, that we are passing upon nothing except the *form* of pleading employed by defendant. While it is true that both counsel have in their briefs gone beyond the necessities of the case and discussed the substance of the so-called recoupment, yet the questions thus presented can not be considered upon a motion to strike. We do not, therefore, desire to be understood as holding finally that defendant has an inherent right to insure against its own negligence, or that the alleged misrepresentation of the plaintiffs concerning the age of the employee deprived them of the right to sue for injuries suffered through negligence. These questions will be passed upon when properly presented.

The motions to strike the recoupment from the answers are overruled.

MUNICIPAL APPROPRIATIONS FOR CELEBRATION OF PATRIOTIC EVENTS.

Common Pleas Court of Cuyahoga County.

THE CITY OF CLEVELAND, BY JOHN N. STOCKWELL, DIRECTOR OF
LAW, v. THOMAS COUGHLIN, DIRECTOR OF FINANCE, ET AL.

Decided, October 10, 1914.

*Municipal Corporations—Legality of Action Taken Depends Upon
Power to Do and the Method Employed in Carrying it Out—Ap-
propriation for Celebration of Perry's Victory—Power to Make Un-
der the Cleveland Charter—Presumption as to Regularity of Pro-
ceedings of Council—Contracts—Ratification.*

The appropriation made by the council of the city of Cleveland toward the expense of celebrating the centennial anniversary of Perry's Victory on Lake Erie, was an appropriation for a public purpose and was authorized by the charter of that city.

J. N. Stockwell and A. E. Powell, for plaintiff.

Newton D. Baken and Jos. C. Hostetler, contra.

1914.]

Cleveland v. Coughlin.

KENNEDY, J.

This is an action brought by the city solicitor of the city of Cleveland on behalf of the city to restrain the defendants, officers of the city of Cleveland, from carrying out the provisions of ordinance No. 32,012, passed by the council of the city and authorizing and directing the commissioner of accounts "to draw his warrant upon the treasury of the city of Cleveland in the sum of \$6,000 payable to the treasurer of the finance committee of the Perry's Victory Centennial Commission of Cleveland." The ordinance provided further that the said sum shall be paid only when the commissioner of accounts "is satisfied by sufficient evidence that the Perry's Victory Centennial Commission will discharge all claims against it in full by the disbursement of the said sum of \$6,000."

The facts are fully set forth in the petition and answer, and argument was had and the case submitted upon these pleadings, that is to say, upon plaintiff's motion for judgment upon the pleadings.

Briefly and in substance the facts are these: In October, 1911, the council of the city of Cleveland passed a resolution setting forth that the Perry's Victory Centennial Commission appointed by the Federal Government, and by the states of Ohio, Pennsylvania, Michigan, Illinois, Wisconsin, New York, Rhode Island and Kentucky, had adopted measures looking to a fit observance of the centenary of Perry's victory on Lake Erie and the other events of the War of 1812; and that it was the desire of this main committee that the patriotic celebration of these events should extend to all of the principal ports on the Great Lakes. This resolution authorized the mayor to appoint a committee of seven citizens "to direct the participation of this municipality in conjunction with her sister cities on the Great Lakes" in this celebration. In pursuance to this resolution, a committee of seven was appointed by the mayor of the city of Cleveland. Thereafter the original committee of seven was enlarged by the mayor, and this committee collected from the citizens of Cleveland a sum in excess of \$7,000 for the purpose of conducting this celebration. Early in the year 1913 certain of

the members of this commission resigned and on the 28th day of March of that year the mayor, in a communication to the council, notified that body that unless otherwise directed by them, he would arrange for the celebration of Perry's victory by appropriate exercises in the public parks of the city, and that such celebration would be conducted by the city park department. Nothing further was done by the council until June 30, 1913, when a resolution was passed "*requesting*" the mayor "to take immediate steps to secure the presence of the Niagara in Cleveland harbor on its memorial trip, and make every effort to arrange a celebration of this occasion which will truly represent the loyal and patriotic spirit of the people of Cleveland." This is the language of the resolution. After the passage of this resolution of the council of the city of Cleveland, the mayor appointed a committee of one hundred representative citizens of Cleveland to have charge of the various arrangements in connection with this celebration. This committee collected a sum, alleged in the answer to have been in excess of \$38,000, by private subscription, and the celebration was held. There was a deficit of approximately \$9,000 when the celebration was completed. Of this amount, as I was informed by counsel at the trial, the state of Ohio, through its military department, paid about \$3,000, and the city council, in its appropriation ordinance for the year 1914, set aside the sum of \$6,000 to wipe out the remainder of the deficit. On the 19th day of January the council, by resolution, called upon the Perry Centennial Commission appointed by the mayor to furnish to the council "a detailed statement to show receipts of all sums from whatever source, and expenditure of the same." This statement was prepared and filed with the council, and thereafter, on the 8th day of June, 1914, the council passed the ordinance, to enjoin the operation of which this action is brought by the plaintiff.

In every case similar to this involving the validity of any action of a municipal corporation, the two main questions involved are these: first, has the municipality in question the power to do the particular act? Second, if there is sufficient power, has there been an exercise of it according to law? In every such

1914.]

Cleveland v. Coughlin.

case it is quite essential to bear in mind the distinction between the *thing* which the municipality is attempting to do, and the *method* which has been selected to do it. Whether or not a municipality has or has not the legal right to do a particular thing depends upon its *powers*, but when once it is determined that power sufficient to do the act is possessed by the municipality, then the question of method depends upon the restrictions, if any, which have been placed upon the exercise of the power by the authority from which the power comes. To illustrate: Municipalities in Ohio are by general law given the power "to contract." Now, if the Legislature had seen fit to place no restrictions upon this power to contract, then the method of contracting would have been performed by each municipality as in its opinion was best fitted to its needs. After determining that the municipal corporation has the power to contract, it must be shown, in order to invalidate any particular contract, that the method used in entering into it was in disregard of some specific and mandatory restriction placed upon the exercise of the power by the source from which it came. The thing which the municipality is attempting to do in this case is to pay for certain material and labor, furnished upon the order of a commission appointed by the mayor, at the request of the city council, and used in the celebration of an event which the city council had decided to be for the best interest of the city to celebrate. The fact that the check of the city is to be made to the treasurer of the commission does not change the use to which it is put, for, an officer of the city, to-wit, the commissioner of accounts, is given full and complete control over the distribution which is to be made of the fund. In my opinion, if the city of Cleveland, on the date of the passage of this ordinance No. 32012, had the power to expend money raised by taxation for this sort of a celebration, it had the power to ratify the expenditure which had already been made, and having ratified such expenditure, it has the power to order that payment be made. The books are full of cases in which the doctrine of ratification has been applied to acts and contracts of municipal corporations. In every case in which the doctrine was applied, it

was for the purpose of validating an act or contract which would otherwise be invalid, because clearly, if a given contract complies with every provision of the law, and is a legal and binding contract, there is no reason nor need for invoking the doctrine of ratification. An act or contract which was *ultra vires* at the time it was performed or entered into may be ratified if there is power in the corporation to authorize the act or to make the contract at the time of ratification.

In 28 Cyc., 675, the law is stated as follows:

“An illegal or *ultra vires* municipal contract being void is not susceptible of validation unless meanwhile the Legislature has conferred upon the corporation power to ratify or to make such contracts, but contracts made by a municipality without authority may be ratified by it when it has acquired authority from the Legislature.”

Bearing in mind the distinction between the power to do the thing, and the method by which it shall be done, ratification may cure a defect in method, but not a defect in power. A study of the cases will show that contracts have been held valid upon the theory of ratification where, without it, they would have been invalid because of failure to comply with the restrictions placed by the Legislature upon the making of contracts.

The power of the city of Cleveland to make this sort of expenditure depends upon the construction which shall be given, first, to Section 3 of Article XVIII of the Constitution of the state of Ohio as amended in 1913, and which reads as follows: “Municipalities shall have authority to exercise all powers of local self government * * *,” and second, to the charter of the city of Cleveland which was adopted by the people on the first day of July, 1913, and by which the people of the city accepted this power of “local self government” and provided for its exercise. Section 198 of the charter provides:

“For the purpose of nominating and electing officers and exercising the powers of the city as provided herein, this charter shall take effect from the time of its approval by the electors of the city.”

"The powers of the city" are set forth at length in Sections 1 and 2 of the charter. Such powers as relate to the matter in issue here are as follows:

Section 1. "The inhabitants of the city of Cleveland, as its limits now are or may hereafter be, shall be a body politic and corporate, by name, the city of Cleveland, and as such shall have perpetual succession * * *; may appropriate the money of the city for all lawful purposes; * * * may pass such ordinances as may be expedient for maintaining and promoting the peace, good government, and welfare of the city, and for the performance of the functions thereof. The city shall have all powers that now are or hereafter may be granted to municipalities by the Constitution or laws of Ohio; and all such laws, whether express or implied, shall be exercised and enforced in the manner prescribed by this charter, or when not prescribed herein, in such manner as shall be prescribed by ordinance or resolution of the council."

Section 2. "The enumeration of particular powers by this charter shall not be held or deemed to be exclusive, but, in addition to the powers enumerated herein, implied thereby, or appropriate to the exercise thereof, the city shall have, and may exercise all other powers which, under the Constitution and laws of Ohio, it would be competent for this charter specifically to enumerate."

In the case of *Morton v. Philadelphia*, 4 Pennsylvania Dist., 523, the court was considering the power of the city to spend public money to transport the Liberty Bell to the Atlanta Exposition and exhibit it there. The grant of power in the charter of Philadelphia, upon which the decision turned, provided that the city shall have "full power and authority to make, ordain, and establish such and so many laws, ordinances, and regulations as shall be necessary for the *welfare and comfort* of the city." The court at page 544 says, in speaking of the scope of this grant of power: "This is a very extensive and most comprehensive grant of power." And further along the same page: "Our charters are as broad as the illimitable ocean of our necessities and our welfare."

The specific grant of power in the charter of Cleveland, Section 1, to "pass such ordinances as may be expedient for main-

taining and promoting the peace, good government, and welfare of the city" would, under the rule in the Liberty Bell case, justify this sort of expenditure. When one reads the last sentence of Sections 1 and 2 of the Cleveland charter, it is plain that the intention of the people of Cleveland when they adopted this charter was to accept the benefits of home rule and provide for the exercise of "local self government" to the fullest extent. The methods of the exercise of certain functions of this local sovereignty are fully prescribed by the language of the charter. In addition, Section 2 clearly shows that this charter was not intended to carry only such powers as are specifically mentioned, but was rather to give to the municipality, to use the words of the charter, "all other powers which under the Constitution and laws of Ohio it would be competent for this charter specifically to enumerate."

The only remaining question which can affect the power of the city to do this thing is this: Would it be competent for the charter specifically to enumerate the power to contribute toward a celebration of patriotic events? The municipality in the exercise of the right of "local self government" is, of course, bound by the provisions of the Constitution of the state of Ohio, the same as is the Legislature of the state in matters of state government. Neither of them can spend money derived from taxation for other than "public purposes." The state Legislature under the old scheme of "delegated" powers could not delegate the right to a municipality to spend public money for other than "public purposes."

That the expenditure of public moneys for this kind of a celebration is a public purpose; that state Legislature *may* make such expenditures upon the part of the state; that the Legislature *may* delegate to municipalities the power to make such expenditures of public funds, are propositions which have been decided over and over again. The leading cases, or practically all of them, are cited in the brief filed by the defendants, and I shall make no effort to review them at this time or make any lengthy quotations. The cases do not hold that the discretion

1914.]

Cleveland v. Coughlin.

of the legislative bodies is absolute and not subject to judicial review. The case of *Doggett v. Colgan*, 92 Cal., 53, states this rule as follows:

“What is for the public good, and what are public purposes, are questions which the Legislature must decide upon its own judgment, in respect to which it is vested with a large discretion which can not be controlled by the courts, *except perhaps when its action is clearly evasive.*”

There might well be a case where the celebration, for which the municipality was attempting to spend public money, would be so plainly private in its nature that the court would intervene and overrule the will of the legislative body, but the contention has been at no time made that this particular celebration was in any sense private. The fact is that the celebration here was but a part of a nation-wide recognition of the bravery and patriotism shown by Commodore Perry and his men in what is one of the most notable victories ever won upon the water, and we can not be blind to the fact, in considering the question as to whether this was “a public purpose,” that six states of the Union and the Federal Government spent together in excess of \$600,000 in preparing for and properly celebrating this anniversary.

The case of *State, ex rel City of Toledo, v. Lynch*, 88 O. S., 71, is rather unsatisfactory as a precedent, even though it were decisive of the point in issue here. The court in that case laid down two propositions; first, that the amendment to the Constitution granting “home rule” to cities was not self-executing; second, that the city of Toledo could not, by its council, vote to expend public money for the construction and equipment of a moving picture theater. With the first proposition we have no concern. The opinion of Chief Justice Shauck, commencing at page 90, places the second proposition upon two grounds. At page 96 he says:

“Since municipalities get their power from the state, it is mathematically certain that they can include no power not possessed by the state.”

The case of *State, ex rel v. Guilbert*, 56 O. S., 575, is often referred to upon the proposition that the functions of the state are primarily governmental only, except so far as proprietary rights may become incident to the exercise of the primary function, the conclusion being that the state itself would be without power to construct and operate a motion picture theater because it is not a "public purpose," nor a "governmental function." At page 97 the chief justice says:

"Among those who had attentively studied the functions of written constitutions, it was accepted as a sound proposition that a municipality might own and operate only such utilities as it used in its municipal operations. Those who are responsible for this amendment were aware that no enlargement of that capacity was denoted by the provisions of the third section 'that municipalities shall have authority to exercise all powers of local self-government,' and, therefore, they employed the express language of the later section of the article to confer that capacity with respect to other utilities. And as to them, there are provisions to safeguard the interests of the people, while capacity to operate amusements, if conferred at all, is conferred without restrictions."

The opinion thus holds that the delegation to municipalities of the powers of "local self government" carried no additional powers to act in a proprietary capacity, in that, inasmuch as a motion picture theater would be operated by the city in its proprietary capacity, the power to do so could not be claimed under this grant. Each municipal action taken under the "home rule" amendment must be in a measure quality itself. This celebration was certainly an exercise of a governmental as distinguished from a proprietary function of the city. It seems to come well within the definition of the phrase of "all powers of local self government" as given by the chief justice at page 97 of the Toledo case:

"They are such powers as, in view of their nature and the field of their operation, are local and municipal in character."

I am of opinion, therefore, as to the *power* of the municipality to do this thing, first, that the celebration of this event was a

1914.]

Cleveland v. Coughlin.

public purpose; second, that after the adoption of its charter on July 1, 1913, the city of Cleveland was entirely within its power in expending money to aid and encourage such celebration; third, that having the power to expend money for this purpose when the ordinance in question passed, it made a legal ratification of the expenditure which had been made.

There remain to be considered only one or two objections which were urged as to the propriety of the method adopted by the council in expending this money, to-wit, a commission appointed by the mayor.

It was urged in argument that the provisions of Section 122 of the charter will be violated if this ordinance is made effective. Section 122 is as follows:

“No contract, agreement, or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money be passed by the council, or be authorized by any officer of the city, unless the director of finance first certify to the council, or to the proper officer, as the case may be, that the money required for such contract, agreement, obligation, or expenditure, is in the treasury, to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the city is discharged from the contract, agreement, or obligation.”

Nothing to the contrary appearing in the pleadings, and the allegation of the petition being that ordinance No. 32012 was “duly enacted,” it must be presumed that before its passage the director of finance did certify that the sum of \$6,000 was in the treasury of the city available for the purpose specified in the ordinance. If this certification was made to the council, then, so far as this case is concerned, Section 122 of the charter has been fully complied with.

There was no contract which bound the city of Cleveland to the payment of a given amount of money prior to the passage of ordinance No. 32012, and therefore there was nothing which

required certification until this ordinance was introduced recognizing the claims and authorizing their payment.

The argument was also made, that even if the city of Cleveland had power to spend public money for celebrating this occasion, the expenditure would have to be made after advertisement and competitive bidding. The charter, in Sections 118 and 119, dealing with the division of purchases and supplies, contains the only restrictions which I can find upon the method to be used in making purchases for the city. The language of these sections, which covers the matter in question here, is as follows:

Sec. 118. "The commissioner of purchases and supplies shall make all purchases for the city in the manner prescribed by ordinance. * * *

Sec. 119. "Before making any purchase or sale, the commissioner of purchases and supplies shall give opportunity for competition, *under such rules and regulations as the council shall establish.*"

If there is any requirement for advertisement and competitive bidding upon purchases in excess of five hundred dollars, as provided by the General Code, since the charter of this city became effective, it must be because of some ordinance of the council prescribing this method. Any requirement which the council has the power to determine upon and prescribe can of course be changed by that body, if in the exercise of its discretion it seems that a change is necessary in any particular event.

It is familiar law, and members of the city law department have argued before me several times and contended, that in the letting of public contracts to the director of public service, for instance, has the power to *waive* any formality which he himself prescribes. The formalities which he has no power to waive are the mandatory enactments of the Legislature restraining the power to contract, at what was, prior to the "home rule" charter, its very source. But it seems to me that there are broader grounds which justify this procedure. The city of Cleveland was *not* making a purchase when it approved these expenditures and ordered them paid. It was uniting, through its commission,

1914.]

Cleveland v. Coughlin.

with its citizens for the celebration of this event. Thirty-eight thousand dollars and over, came from the people of Cleveland \$3,000 from the state of Ohio, over \$41,000 in the total from sources outside of the municipal government. If the council has the power to conduct this celebration, they have, in my opinion, the power to do so in the manner which is apparently the most successful, namely, by the appointment of a committee through which the co-operation of the public can be successfully secured. The state of Ohio expended its \$130,000 through a commission, as did every other state participating in the celebration. In every case cited this has been the method used to conduct similar activities, both by states and municipalities, and in every case, once it has been decided that the municipality has the power to expend the money for a celebration, no question has been raised as to the propriety or legality of the city turning its contribution over to a commission to be used with other money contributed by individuals, or ordering the proper officers to pay out money upon the warrant of a commission. If a contribution may be made before the celebration, how much more proper it is to provide for the payment of certain items, a detailed account of which is before the council, when the payment is ordered.

The fact that an act or contract, which it was within the power of the municipality to perform or make, may be ratified in spite of an informality or unusual method in doing the act or making the contract, and a valid obligation created against the municipality has been set forth earlier in this opinion.

If this charter set forth specifically the steps to be taken before any liability was imposed, it could not be more mandatory and specific than the sections of the General Code which governed prior to the charter. In construing the sections of the General Code, it has been held that where the municipality has received the benefit, even though, because of some informality, there could be no payment enforced, the city may recognize the obligation and authorize the payment.

Mr. Powell, who appeared in argument in this case, in his letter to Mr. Gordon of March 26, 1914, a copy of which he sub-

mitted as a brief in this case, recognizes and sets forth the authority for this principle in this language:

“I am further of the opinion that if the council had the power in the first instance to appropriate moneys for such purposes, the present situation demands that such legislation be now had, and the executive sustained in his pledge of the city's support. If the power originally reposed in the council to provide in whole or part for the Perry Celebration, an ordinance to that end, though retroactive, would be *proper* if, and if only, the claim comes within the requirements that it is just and is for something beneficial and necessary to the city, but unenforceable by reason of lack of some legal prerequisite. *State v. Wall*, 2 N.P.(N.S.), 517.”

The ordinance requesting the mayor to appoint the commission which made these expenditures was passed on the 30th of June, 1913. On the first of July, 1913, the charter was adopted. It gave the city full power, if I have construed it correctly. The council has determined that the claims are just, and several times has determined that the celebration was beneficial to the city.

For the reasons given, the motion for judgment on the pleadings is overruled, the temporary restraining order allowed pending the hearing will be dissolved, the injunction will be refused and the petition dismissed.

1914.]

Irvine, Receiver, v. McCoy.

LIMITATION OF ACTIONS TO ENFORCE STOCKHOLDERS' LIABILITY.

Common Pleas Court of Franklin County.

ELLSWORTH C. IRVINE, RECEIVER IN THE CASE OF MARRIOTT
AGAINST THE COLUMBUS, SANDUSKY & HOCKING
RAILROAD CO. ET AL, V. ISAAC N. MCCOY.*

Decided, June 13, 1914.

Corporations—Stockholders' Liability and Actions to Enforce—Limitation Contained in Section 8688 Not Applicable, When.

The eighteen months limitation prescribed by Section 8688 for actions to enforce the liability of stockholders has no application to a suit for judgment on an assessment against stockholders levied in an action begun prior to the enactment of said section.

E. C. Irvine, for plaintiffs.

W. B. Cockrell, for defendant and for plaintiff in error.

Wilson & Rector, for defendants in error.

EVANS, J.

This case is submitted on demurrer of the plaintiff to the answer of defendant.

*Affirmed by the Court of Appeals in the subjoined memorandum:

ALLREAD, J.; FERNEDING, J., and KUNKLE, J., concur.

This action was brought by Irvine as receiver to recover a personal judgment against McCoy upon a stockholders' assessment made in the original creditor's action.

The defendant answered by claiming the benefit of the eighteen months statute of limitations enacted after the cause of action arose and the original stockholders' assessment was made.

In the original action McCoy was brought in by publication. There was no personal service against him in that action. The plaintiff in error relies upon the authority of *Shipman v. Treadwell*, 208 N. Y., 404.

The defendant in error cites the case of *Irvine, Receiver, v. Blackburn*, 199 Fed., 360, affirmed 205 Fed., 217.

We adopt and follow the reasoning and authority of the Blackburn case as in harmony with the decisions in this state. It follows, therefore, that the judgment of the court of common pleas should be affirmed.

The action seeks to recover against defendant a judgment for \$143.75, interest and costs.

The action is predicated upon a judgment and decree heretofore had in this court in the consolidated cases of Marriott against the Columbus, Sandusky & Hocking Railroad Company, and the A. E. Kinsey Company against said railroad company, said consolidated actions being by creditors of said railroad company, which said company had theretofore been declared insolvent by the court, against the stockholders of said railroad company to recover against each stockholder thereof his ratable proportion of any deficit remaining after the application and exhaustion of the assets of said insolvent railroad company, to the debts of said company, in proportion of the amount of stock held by each of said persons.

The defendant in this action, said Isaac N. McCoy, was made a party defendant in said consolidated actions, and was duly served by publication, in accordance with the statutes of Ohio in such cases made and provided.

The court in said consolidated cases found that said Isaac N. McCoy was the owner of five and seventy-five hundredths shares of the capital stock of said railroad company, and the court adjudged and decreed that there is due from said Isaac N. McCoy, as such stockholder in said railroad company, to the creditors of said railroad company, the sum of \$143.75.

The plaintiff herein, Ellsworth C. Irvine, was, by the court, appointed receiver in said cause, under the statutes of Ohio, to collect from the several defendant stockholders in said action, including defendant herein, the several sums of money found due from said stockholders in said action, and said several defendants in said action were ordered to pay to said receiver, on or before August 20, 1905, said amounts so found due. The amount assessed against said defendant, McCoy, being for the sum of \$143.75, and in default of payment to said receiver, said receiver was authorized, empowered and directed to sue in his own name, as receiver, in any competent jurisdiction to recover the amount so found due as aforesaid.

This action by said Irvine, as such receiver, was begun and filed against said McCoy in this court on January 26, 1914, and

1914.]

Irvine, Receiver, v. McCoy.

said defendant, McCoy, was served personally with summons, and has filed his answer herein to the petition, to which answer the plaintiff demurs.

Defendant, by his answer, admits the allegations of the petition to be true, but says that the alleged claim and cause of action set up in the petition should not be maintained, for the reason that the same is barred, and can not be enforced, because of the provisions of the Revised Statutes of Ohio, Section 3258a, now Section 8688 of the General Code of Ohio.

Said Section 8688, General Code, provides that—

“An action upon the liability of stockholders under the two next preceding sections can only be brought within eighteen months after the debt or obligation shall become enforceable against stockholders.”

The question here presented by the demurrer is whether said Section 8688, General Code, has application to an action by a receiver to recover the amounts found due and assessed by a court in an action against stockholders by creditors to enforce stockholders liability.

Section 8688, General Code, was first enacted by the legislative act of April 29, 1902 (95 Ohio Laws, p. 312).

The consolidated actions against said Columbus, Sandusky & Hocking Railroad Company, were begun and filed, the one by said Marriott, on January 14, 1899, to subject all stockholders to pay ratably for the payment of the debts of said insolvent company, in proportion to the amount of stock held by each of such stockholders. The other by said Kinsey Company, seeking the same relief, was begun and filed December 22, 1899. Subsequently said two actions were consolidated, as aforesaid.

The several stockholders of said railroad company were made parties defendant in said actions, and all such defendants residing in Ohio were personally served with summons, and all other defendants, including defendant herein, were duly served by publication, according to the statute of Ohio.

At the time of the commencement of said actions and the proceedings aforesaid, and at the time of the enactment of Section 8688, General Code, Section 79 of the Revised Statutes of Ohio

(now Section 26, General Code), was in full force and effect, which section provides:

“Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed; nor shall any repeal or amendment affect causes of action, prosecutions, or proceedings, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.”

The said act of April 29, 1902 (now Section 8688, General Code), was an act to amend and supplement Section 3258, Revised Statutes of Ohio.

It is held by the Supreme Court of this state in *State v. Trustees of Washington Township, etc.*, 24 Ohio State Reps., 603, that:

“By virtue of the act of Feb. 19, 1866 (S. & S., 1) a right of action given by a statute, and existing at the time of the amendment or repeal of the statute, is not affected by the amendment or repeal, unless otherwise expressly provided in the amending or repealing act.”

The amending act of April 29, 1902 (now Section 8688, General Code), makes no provision that said amended act shall operate to affect pending actions or pending proceedings, said actions of Marriott, and of Kinsey & Co., aforesaid, having been begun and filed, and said causes of action having arisen prior to the provisions of Section 8688, General Code, having been enacted. The provisions of said Section 8688, General Code, have no application to said pending actions.

It will also be observed that said Section 8688, General Code, provides “an action upon the liability of stockholders,” etc. The actions of Marriott and Kinsey & Co. were actions upon the liabilities of stockholders. They were actions brought by creditors to bring in all the stockholders, and to subject them on their statutory liability as stockholders for the payment of debts of said insolvent railroad company in which they held stock.

1914.]

Irvine, Receiver, v. McCoy.

The present action against McCoy is not an action to determine the liability of stockholders, but it is an action by the receivers appointed by the court to recover judgment against McCoy, and to require him to pay the assessment heretofore rendered against him in the actions by said creditors to determine the liabilities of the stockholders.

Hence it is apparent that the eighteen months limitation provided in Section 8688, General Code, has application only to service of summons upon defendant stockholders in action by the creditors to determine and fix the amount of liabilities by the stockholders, such as was had in the actions by Marriott, and by Kinsey & Co., which were consolidated.

In these actions McCoy was a party, upon whom was had constructive service under the statute, and the court found that he was a stockholder in said company and assessed the amount aforesaid due from him on his said stock liability.

In my opinion Section 8688, General Code, having been a legislative enactment passed after the cause of actions arose, and were begun and filed, in Marriott and in Kinsey & Co. against the said railroad company, and said stockholders, said section of the statutes, and the limitations therein provided had no application to said pending actions.

The same question here presented has heretofore been made in this court, and decided in *Marriott v. C., S. & H. R. R. Co.*, 16 Ohio Decisions, 135, that said eighteen months limitation has no application to said pending actions.

The decision there is here adhered to that said Section 8688, General Code, has no application to a suit by the receiver to collect the assessments in said case found by the court to be due and payable by said stockholders.

The demurrer by plaintiff to the answer is sustained.

**UNENFORCEABLE CONTRACT PROCURED BY REAL
ESTATE AGENTS.**

Common Pleas Court of Hamilton County.

G. W. DURRELL AND THE KAUFHOLD REALTY COMPANY v. STATIA
B. REYNOLDS, INDIVIDUALLY, AND AS EXECUTOR AND
TRUSTEE OF THE ESTATE OF E. B. REYNOLDS,
DECEASED.

Decided December 1, 1914.

*Contracts—Real Estate Agent Not Entitled to a Commission for Pro-
curing a Purchaser for Property Unless He Procures an Enforceable
Contract—Test as to Whether a Contract is Enforceable.*

1. A real estate agent employed to procure a purchaser for property is entitled to compensation only in the event a sale is effected, or on default of the seller to deed the property if the agent has secured a valid and enforceable contract of sale. *Pfanz v. Humburg*, 82 Ohio St., 1.
2. A real estate agent who procured a contract of sale signed "Estate of L. B. H., C. L. H. et al, trustees," there being three trustees, is not entitled to his commissions in the absence of evidence showing C. L. H.'s authority to sign the contract on behalf of his co-trustees.
3. Such a contract is unenforceable against the estate and against C. L. H. individually.
4. The test of an enforceable contract is whether a court of equity would decree specific performance.

Hunt, Bennett & Utter, for the plaintiffs.

Powell & Smiley, contra.

MAY, J.

At the conclusion of all the evidence in this case, both sides made a motion for a directed verdict, and neither side desiring to go to the jury on any question of fact, the testimony was submitted to the court. The action is to recover from the defendants \$1,800 for commissions earned in procuring a customer for the sale of certain real estate devised to the defendants by the last will and testament of E. B. Reynolds, deceased.

The plaintiffs "were authorized to procure a purchaser for the real estate," and defendants "agree to pay a commission of three per cent. on the amount for which said property may be sold." The purchase price was \$60,000. The owners of the property guaranteed the title good.

On April 18, 1913, the plaintiffs procured to the contract of sale the following acceptance:

"CINCINNATI, OHIO, April 18, 1913.

"We hereby agree to purchase the above described property at the price and upon the terms above stated.

"Signed, ESTATE OF L. B. HARRISON,

"C. L. HARRISON ET AL, TRUSTEES."

The sale was not consummated, the evidence showing that the estate of L. B. Harrison, through its attorneys, Frank Cottle and Rufus B. Smith, demanded of the owners of the property certain quit-claim deeds, or that an action be brought to construe the will of E. B. Reynolds, with which request the owners refused to comply.

The only question in this case is, did the plaintiffs, as real estate agents, procure a contract of purchase and sale which the owners could enforce?

In Ohio it is now settled by the case of *Pfanz v. Humburg*, 82 Ohio St., 1, that where an agent is employed to procure a purchaser for the sale of real estate he is not entitled to his commission where he fails to procure a contract of purchase and sale which the owners could enforce; that under his contract of agency he is required either to make a sale or to secure a valid contract for the sale in order to receive compensation.

The evidence produced on behalf of the plaintiffs showed that the trustees of the estate of L. B. Harrison at the time of the signature to the contract of sale were three in number, to-wit, C. L. Harrison, Rufus B. Smith and E. P. Harrison.

The will of L. B. Harrison, deceased, was not introduced in evidence, and there is no evidence to show that C. L. Harrison individually was authorized to contract as trustee on behalf of his co-trustees. It needs no citation of authorities to establish the fact that where there is more than one trustee, that all

trustees must sign a contract to bind the trust estate. Indeed, this was admitted by counsel for the plaintiffs. It is contended, however, that the contract is an enforceable one; because, signed in the manner that it was, "The Estate of L. B. Harrison, C. L. Harrison et al, trustees," it became the individual contract of C. L. Harrison, and C. L. Harrison was individually liable, and as the evidence showed he was financially responsible, the real estate agents were entitled to their commissions.

In order to determine whether the contract is an enforceable contract, it is necessary to ascertain whether this contract was one which a court of equity would enforce specifically. If in a suit for specific performance against C. L. Harrison individually, C. L. Harrison could successfully contend that the contract was not an enforceable one, then the plaintiffs would not be entitled to judgment. I am of the opinion that this contract is not a contract which a court of equity would have enforced specifically against C. L. Harrison individually. Learned counsel for the plaintiffs have shown beyond a doubt that contracts entered into by trustees bind trustees individually. Of this there can be no doubt and all cases cited by counsel in their exhaustive briefs bear out this contention.

The reason why trustees are individually bound is stated by Mr. Justice Story in his work on Promissory Notes, Section 63:

"As to trustees, guardians, executors, and administrators, and other persons acting *en autre droit*, they are, by our law, generally held personally liable on promissory notes, because they have no authority to bind, *ex directo*, the persons for whom, or for whose benefit, or for whose estate they act; and hence, to give any validity to the note, they must be deemed personally bound as makers."

This principle was applied in the case of *Reiff v. Mullholland et al*, 65 Ohio St., 178. But these cases are no authority for the proposition that a court of equity will grant specific performance against one individually who signs a contract of purchase as trustee.

At the trial, C. L. Harrison testified as follows:

"Direct Examination.

"By Mr. Hunt—

"Q. Were you ready to perform that contract? A. Yes, sir.

1914.]

Durrell et al v. Reynolds et al.

“By the Court—

“Q. You mean the estate was ready to perform that contract? A. Yes, sir, the estate was ready.

* * * * *

“Cross-Examination.

“By the court—

“Q. Did you have any intention individually of buying this property? A. I had no such intention.”

In the suit for specific performance, C. L. Harrison undoubtedly could have successfully defended on the ground of mistake, in other words, a court of equity finding as a matter of fact that C. L. Harrison did not intend to contract individually, but only in his trust capacity, would not have enforced specific performance against him. Even if the instrument, executed in the manner that this contract was executed, had been a promissory note, it seems that C. L. Harrison could have successfully maintained an action for reformation of this instrument in order to avoid individual liability.

In *Reiff v. Mullholland*, *ubi supra*, Judge Shauck, at page 184, says:

“This liability (the individual liability of one signing as trustee) appears to have been recognized when the defendants filed their cross-petition alleging that the note was drawn and executed in its present form by mistake, and that it was intended that the instrument should be the obligation of the association instead of the defendants, and praying for its reformation so that it should conform to that intention. That is the proper mode of seeking relief on account of mistake. It recognizes the familiar doctrine that mistakes in written instruments are not corrected at law, that in the absence of fraud the written stipulations of parties must stand until they are corrected in equity where the facts necessary to reformation are found by the court instead of a jury, and where there is required evidence of greater probative effect than a mere preponderance.”

If, therefore, a promissory note signed by a trustee could so be reformed to enable the trustee to escape individual liability, it necessarily follows that in an action in equity to enforce specific performance of a contract for the purchase of land against one

individually who has signed as trustee, such a contract could be reformed and the trustee would escape individual liability.

The plaintiffs contend, however, that C. L. Harrison is individually liable on the contract of sale and that therefore an enforceable contract of sale has been obtained. The undisputed evidence is that C. L. Harrison did not intend to be bound individually. See his testimony above set forth. Objection was made to the competency of this testimony; still it was admissible under the ruling as set forth in the last paragraph of the opinion of our circuit court in *Fleischmann v. Shoemaker*, 2 C. C., 152, at 162.

Then again, after the plaintiffs gave the defendants a copy of the contract the defendants opened up negotiations with the trustees of the Estate of L. B. Harrison and their attorneys, and not with C. L. Harrison individually, thus showing that both parties to the contract thought they were dealing with the estate of L. B. Harrison. The evidence also shows that the defendants as vendors under the contract, executed a deed to the trustees of L. B. Harrison and tendered the same to said trustees in performance of the contract. This clearly appears that the defendants did not treat C. L. Harrison as individually bound in the agreement. All the parties, the plaintiffs as real estate agents, the defendants as vendors, and C. L. Harrison as trustee, thought that the sale had been made to the trustees of the L. B. Harrison estate and not to C. L. Harrison individually. These being the undisputed facts no court of equity would decree specific performance against C. L. Harrison individually because of the mutual mistake of the parties. If then, there could be no specific performance of the contract against C. L. Harrison individually, it being admitted that the estate was not bound because all three trustees did not sign the contract, then there was no enforceable contract of sale procured and the defendants are not liable to the plaintiffs for their commissions.

Another answer might be given to the plaintiffs' contention that C. L. Harrison in signing "The Estate of L. B. Harrison, C. L. Harrison et al, trustees," became bound individually. Admitting for the purpose of the argument that a contract signed "The Estate of L. B. Harrison, C. L. Harrison, trustee," binds

1914.]

Durrell et al v. Reynolds et al.

C. L. Harrison individually, still this is not the contract in the case at bar. Here the contract is signed "The Estate of L. B. Harrison, C. L. Harrison et al, trustees." If there were but one trustee the trustee is held to be personally liable on the theory that as the estate itself could not contract, he individually contracts. But here it appears on the face of the contract that there were other trustees besides C. L. Harrison. This is shown by the words, "et al." While the word "trustees" might be considered surplusage, the words "et al" can not be. The contract must be considered as if it had been signed in the name of all the trustees by C. L. Harrison as their agent.

In *Insurance Company v. Chase*, 5 Wall., 509, at page 514, the Supreme Court of the United States said:

"It is true, that in the administration of the trust, where there is more than one trustee, all must concur, but the entire body can direct one of their number to transact business, * * * and the acts of the one thus authorized are the acts of all and binding on all. The trustee thus acting is to be considered the agent of all the trustees, and not as an individual trustee."

If, therefore, C. L. Harrison in signing the contract, "The Estate of L. B. Harrison, C. L. Harrison et al, trustees," was acting as agent for all the trustees, then he can not be bound individually, because his principals are disclosed. This was expressly decided by our Supreme Court in *Aungst v. Creque*, 72 Ohio St., 551, at pages 554 and 555:

"In other words, such instrument so executed, 'wears no mask, but reveals its character upon its face.' * * * Whether or not a bill or note has been executed by a party in his individual or representative capacity, is in each particular case, a question to be determined from a consideration of the whole instrument. And if, giving full effect to all the terms in which the contract is expressed, it plainly appears from the instrument itself that the true object and intent of its execution is to bind the principal and not the agent, the courts will adopt that construction of it, however informally that intention may be expressed."

Therefore, being of the opinion that specific performance would not be decreed against C. L. Harrison individually on the

contract executed by "The Estate of L. B. Harrison, C. L. Harrison et al, trustees," it necessarily follows that the plaintiffs in this case did not procure an enforceable contract either with the estate of L. B. Harrison, because only one trustee signed, or with C. L. Harrison individually, and therefore, upon the authority of *Pfanz v. Humburg, ubi supra*, the defendants are entitled to a judgment.

The defendants likewise contend that the description of the property is not definite enough to decree specific performance and cite in support of this contention a decision of Judge Gorman, *Wertheimer v. Korte*, reported in 8 N.P.(N.S.). In that case there was no description by metes and bounds. In the case at bar there is such a description and this distinguishes it from the Korte case.

The defendants likewise contend that they were entitled to a judgment on the authority of *Wilson v. Mason*, 158 Ill., 304, 311, which is cited with approval by our Supreme Court in *Pfanz v. Humburg*, 82 Ohio St., at page 11. In that case the contract of sale was signed by one of two executors, and the court held that that was not an enforceable contract.

The plaintiffs in this case contend that the Illinois case is not a binding authority upon this court for the reason that the proposition argued in this case, to-wit, individual liability of the trustee signing, was not presented to the Illinois court.

For the reasons stated above I prefer to rest my opinion on the ground that the contract could not be specifically enforced against C. L. Harrison individually, though it must be admitted that the case of *Wilson v. Mason*, 158 Ill., 304, is on all fours with the case at bar.

At the close of the plaintiff's testimony the defendant, Statia B. Reynolds individually and also as executrix of the estate of E. B. Reynolds, deceased, moved for a dismissal.

Inasmuch as I am of the opinion that the defendants are entitled to a judgment on the facts and the law, it is unnecessary to determine whether Statia B. Reynolds would have been individually liable or would have been liable as executrix and trustee of the estate of E. B. Reynolds on the contract for com-

1914.]

Hughes v. Kline.

missions. The failure of the plaintiffs to procure an enforceable contract in this case was their own fault. They should have known that one trustee, in the absence of specific authority, is not authorized to bind his co-trustees. They, therefore, have no one but themselves to blame in this transaction.

A judgment in accordance with this opinion may be entered for defendants.

EJECTMENT OF A VENDEE.

Common Pleas Court of Franklin County.

HUGHES v. KLINE.

Decided, April 29, 1914.

Contract of Purchase of Real Property—Surrender of Possession Provided for in Case of Failure to Pay Installments as They Become Due—Action in Forcible Detainer Lies in Case of Default.

The Ohio forcible detainer statute is broad enough to permit of a suit in forcible detainer against a vendee who has defaulted in his payments under a contract of purchase which expressly provides that in case of default possession shall be surrendered to the vendor.

T. E. Lewis and J. M. Lewis, for plaintiff in error.

S. A. Sharp, contra.

ROGERS, J.

The case is heard on a petition in error together with the transcript and bill of exceptions. The original case was one in forcible detainer, wherein a judgment of ouster was entered. Error is prosecuted to such judgment on the ground that the magistrate erred on a question of law.

It appears that Kline, the owner of the lot, agreed with Hughes to build for him a house thereon according to certain plans, and to sell the same to him for \$3,200; that Kline built the house and had it substantially completed on January 1st, 1914; that Hughes was to pay \$200 down, and the residue in monthly installments

of \$25 each; that Hughes paid \$150 down and about January 1st moved into the house; that differences arose between the parties with reference to the completion of the house and the fulfillment of the building contract; that no writing was ever entered into between the parties, although the writing was probably prepared and submitted to Hughes and was in substance the agreement between the parties; that their contract was in substance that if default in payment was made of any of the monthly installments for a period of thirty days after due, the balance of the principal sum should immediately become due and payable and all rights of Hughes under the contract should at the option of Kline become null and void, and all moneys paid should become forfeited to Kline as liquidated damages and without recourse at law therefor, and that Kline should thereupon have possession of said premises; that Hughes never paid the residue of the down payment nor any of the monthly installments, although demanded by Kline; that Hughes refused to surrender the premises to Kline, whereupon Kline proceeded with the forcible detainer suit after giving the statutory notice in forcible detainer on March 2d to Hughes to leave the premises.

I am of the opinion from the undisputed facts that the judgment below should be affirmed. While the contract was one of purchase and sale, it also expressly provided that in case of default on the part of Hughes, Kline should have possession of the premises. Such possession Hughes refused to deliver to Kline. Kline had the right to treat the contract as null and void upon such default and recover the possession of the premises by virtue of the terms of his contract.

It is contended that as between vendee and vendor, forcible detainer does not lie under our statutes, and the case of *Cowen v. Gordon*, 12 C.C.(N.S.), 431, is cited in support of such contention. However, the case cited does not reach the case before us, at least so far as the report thereof shows. The parties in the case before us agreed that in case of default of the purchaser in the payment of the installments for thirty days, he would at the option of the seller deliver possession to him. He did not do so, and as it appears to me, the right of forcible detainer in that sort of a case is broad enough, under our statute, to give full relief to

1914.]

Hughes v. Kline.

the seller without the necessity of proceeding in ejectment. Our statute (Section 10447, G. C.) provides in substance that forcible detainer can be had as well against those who make unlawful and forcible entry into lands and tenements and detain the same, as against those who have a lawful and peaceable entry into lands and tenements and unlawfully hold the same. It is held in *Yeager v. Wilbur*, 8 O., 399, that the remedy provided by the statute above mentioned extends to all cases of entry or maintenance of possession by actual force, and is not limited in the cases enumerated in Section 10449 G. C.

The case of *Railroad v. Skupa*, 16 Neb., 341, cited by counsel in support of his contention that forcible detainer does not lie, is based upon the theory that the statutes of that state, which are similar to our own, limit forcible detainer to cases like those enumerated in Section 10449 above mentioned. The case of vendor and vendee, not coming within their statute as construed by that court, the right of forcible detainer does not lie. But by the construction placed upon our statute, which is the reverse of the construction placed upon the Nebraska statute, I see no reason why in a case of vendor and vendee, where there is an express contract to deliver possession in case of default, the forcible detainer statute may not be resorted to. By contract the parties have stipulated that the possession shall be given up to the seller under certain conditions and the contract as between them should be null and void. I am unable to see why the owner of the title should be obliged under those circumstances to resort to ejectment to enforce his right of possession. Title is not involved in any way. The right of possession only may be in dispute under the terms of their contract. True, the purchaser may have equities which under certain circumstances he might have enforced if he had resorted to a court of equity for that purpose and sought to have the proceedings in forcible detainer stayed. But he did not do so, and he will not now be permitted to complain because he had an equitable remedy and failed to resort to it.

“In some jurisdictions an action of forcible entry and detainer will not lie by a vendor against a purchaser who has failed to perform; although in other jurisdictions such an action will lie

against the purchaser who enters into possession under the contract and before he receives his deed fails or refuses to comply with the contract, as where the purchaser is in possession under a parol contract, and makes default or repudiates his agreement." 39 Cyc., 1890, and cases.

I think an examination of the cases cited by the author will disclose that in such case the right of forcible detainer is governed by the statute; and where the statute is broad enough to cover the case of vendor and vendee, forcible detainer is permitted; otherwise, it is not permitted. Our statute is broad enough to cover every case of vendor and vendee, at least where they have covenanted with reference to the possession.

Finding no error in the judgment of the magistrate, I, therefore, affirm the same and render judgment against the plaintiff in error for costs and award execution therefor; and the clerk is ordered to certify the decision of this court to the justice of the peace for enforcement of said judgment as if proceedings in error had not been taken. Exceptions.

1914.]

State, ex rel, v. Bonding Co.

**INHERITANCE TAXES AND LIABILITY THEREFOR AS
BETWEEN TWO SURETY COMPANIES.**

Common Pleas Court of Hamilton County.

STATE, EX REL HUNT, PROSECUTING ATTORNEY, V. AMERICAN
BONDING CO. AND NATIONAL SURETY CO.

Decided, 1913.

*Taxation—Inheritance Taxes Are Excise Taxes—Why Paid by Executor
Instead of Distributees—Liability Therefor as Between Two Sure-
ties, One on the Administration Bond and the Other on the Bond
for Sale of Real Estate.*

1. Where an executor gave a general administration bond in the sum of two thousand dollars with one bonding company as surety, and afterward gave bond in the sum of forty-six thousand dollars for sale of real estate with another bonding company as surety, and distributed the entire proceeds of the estate to legatees named in the will without paying the collateral inheritance tax due to the state of Ohio, and thereafter died insolvent and all the legatees are without the jurisdiction of the state, both surety companies are liable as co-sureties in their respective proportions to the state for payment of such collateral inheritance tax, notwithstanding the executor had personal property in his possession sufficient to pay such collateral inheritance tax before the sale of the real estate from the proceeds of which the legacies were paid.
2. Inheritance taxes are taxes on the right and privilege to inherit or succeed to property and are excise taxes and not taxes on the property received.
3. Although an executor is made liable under the statute for payment of collateral inheritance tax, such tax is not paid on account of the estate, but on account of the legatees or distributees whom the state is unwilling to trust.

Pogue, Campbell & Groom, for plaintiff.

D. C. Outcalt, for American Bonding Co.

Healy, Ferris & McCoy, for National Surety Co.

MAY, J.

Demurrer to petition.

The state of Ohio, on relation of the prosecuting attorney, filed its petition against defendants, the American Bonding Company and the National Surety Company, alleging that J. Henry Sulser was appointed executor of the last will of Louis Ertel,

who died March 7, 1900, in case No. 49006 of the Probate Court of Hamilton County, Ohio, and executed a bond in the sum of \$2,000 with the American Bonding & Trust Company as surety, and that afterwards, on July 24, 1900, he executed a bond in an action brought by him to sell real estate for the payment of legacies, in the sum of \$46,000 with the National Surety Co. as surety. The \$2,000 bond provided that the executor should "administer according to law and the will of the testator, all his goods, chattels, rights and credits and the proceeds of all his real estate sold for payments of debts or legacies, which comes to the possession of the executor or to the possession of any other person for him." The \$46,000 bond contained the following:

"Now therefore, if the said J. Henry Sulser shall faithfully discharge his duties as executor of the aforesaid estate and shall faithfully make payment and account for all the moneys arising from such sale, according to law, then this obligation shall be void; otherwise remain in full force."

The state further alleges that the executor collected all the personal estate of the deceased and sold all of his real estate; that the said executor did not faithfully discharge his duties as executor of said Louis Ertel, deceased, and did not faithfully make payment and accounting according to law, of all moneys arising from the sale of the real estate, but failed, neglected and refused so to do; that on October 22, 1902, by an order of the probate court made in the administration of the estate of Louis Ertel, deceased, the executor was ordered to pay forthwith to the treasurer of Hamilton county the sum of \$512.53 as interest, in view of the collateral inheritance tax due from the estate of Louis Ertel as found by an order in said cause made by the probate court, and that wherefore judgment is asked against the sureties, who upon demand refused to pay the judgment for said collateral inheritance tax as was found due.

To this petition the American Bonding Company filed its answer, admitting the execution of the bond and reciting the execution of the bond by the National Surety Company, admits the amount due as collateral inheritance tax and that the executor has failed to pay the same. The American Bonding Company further states "that by reason of the execution of said

1914.]

State, ex rel, v. Bonding Co.

bonds, this answering defendant and its co-defendant, the National Surety Company, became and were co-sureties for the faithful discharge of all duties by said executor and that they were respectively liable in proportion according to the amounts of their respective bonds; that the American became the surety for one-twenty-fourth, and the National Surety Company became the surety for twenty-three twenty-fourths of the amount of any default that might be made by any executor under the administration of such estate."

The National Surety Company by its answer admits the appointment of the executor and the giving of a bond by him in the sum of \$2,000 with the American Bonding & Trust Company as surety. The National Surety Company in its answer, first states that the bond so given was conditioned upon the faithful administration of the trust by said executor. It also admits that it gave a bond on July 24, 1900, for the sum of \$46,000, on condition that the executor would faithfully discharge his duties as executor and faithfully make payment and accounting for all moneys arising from the sale of real estate according to law. The National Surety Company in its answer further avers that the collateral inheritance tax claimed by the state, became due and payable immediately upon the death of the testator, Louis Ertel, and at once became a lien upon the property of his estate both real and personal, and that the executor upon his appointment took title to all the personal property which came into his hands at the time he was appointed and gave bond with the American Bonding & Trust Company as surety, and that prior to the giving of the bond by the National Surety Company, the executor had in his hands more than \$3,000 in money, the proceeds of personal property, which sum of money was more than sufficient for the payment of funeral expenses, of the expenses of administration and debts entitled to preference under the laws of the United States, and all public rates and taxes, including the inheritance tax sued for, and that because said executor did not pay the collateral inheritance tax out of the money realized from the personal property, the condition of the bond issued by the American Bonding Company was broken and that the American Bonding Company became liable to the state for said default, and that the National Surety Com-

pany is in no wise liable to the state of Ohio because said collateral inheritance tax was not paid, it being the duty of the executor to use the personal property for the payment of taxes before using any of the proceeds arising from the sale of real estate for such purposes. The National Surety Company, therefore, asks to be dismissed from this action.

To this answer and cross-petition of the National Surety Company the American Bonding Company filed its demurrer, for the reason that it does not set forth facts sufficient to constitute a cause of action against the defendant, the American Bonding Company.

The sole question in this case is whether the American Bonding Company alone or both surety companies, are liable for the default of the executor in not paying the collateral inheritance tax. On behalf of the National Surety Company it is contended that it is the duty of the executor to use the personal property of the estate for the payment of taxes, and that if he fails to do so and there is a default in this respect, the only surety that can be held for this default is the surety that was on the general administration bond. This claim is founded on Section 10714, General Code, providing for an order in which debts are to be paid.

This section reads:

“Every executor or administrator shall proceed with diligence to pay the debts of the deceased, applying the assets in the following order:

“1. The funeral expenses, those of the last sickness, and the expenses of administration.

“2. The allowance made to the widow and children for their support for twelve months;

“3. Debts entitled to a preference under the laws of the United States;

“4. Public rates and taxes, and sums due the state for duties on sales at auction;

“5. To every person who performed manual labor in the service of the deceased, before payment of the general creditors;

“6. Debts due all other persons.”

It will be sufficient to state that this section merely fixes the priority of payments and designates the persons who are entitled to preferential payments. It does not follow that if the

1914.]

State, ex rel, v. Bonding Co.

executor does not make these payments from the funds in his possession at the time he has these funds, that this is a default of his and that his surety only is liable for such default. If the executor gets into his possession money from other sources than personal property, as for instance, proceeds from the sale of real estate, and commingles these proceeds with the money he derived from the personal estate, and then there is a default, both sureties will be liable.

This certainly must be true as far as taxes are concerned. The real estate which is held for the payment of debts or legacies may have a lien upon it for taxes, and if the proceeds are not used for the payment of these taxes, there would be such a default as is provided for in the bond; that is, the executor would not have accounted for all the moneys arising from such sale according to law, because one of the provisions of the statutes is that after the payment of the cost of the suit in which the proceeds are brought, the taxes must then first be paid.

However, it is not necessary to rest my opinion on this section of the General Code; nor to ascertain the duty of the executor in regard to the payment of the collateral inheritance tax. It is necessary to understand the nature of these taxes. It is well settled in Ohio, as elsewhere, that inheritance taxes are not a tax on property, but are a tax on the right to inherit. In *State v. Ferris*, 53 Ohio St., 314, it is held that an inheritance tax when properly understood is a tax on the right and privilege to inherit or to succeed to property. It is an excise tax and not a tax on the property received. In *Haggerty v. State*, 55 Ohio St., 613, the same view is taken in regard to the collateral inheritance tax; and in *State v. Guilbert*, 70 Ohio St., 229, the court approved the Ferris and Haggerty cases.

While it is true that the collateral inheritance tax under Section 5331, General Code, is made due and payable immediately after the death of the decedent, and at once becomes a lien upon the property and remains a lien until it is paid, nevertheless, this is merely for the security of the state. The administrator, executor or trustee under Section 5336, General Code, having in charge or trust property subject to such law, shall deduct the tax therefrom, or collect the tax thereon from the legatee, or persons entitled to the property. He shall not deliver any spe-

cific legacy or property subject to such tax to any person until he has collected the taxes thereon. So that in the end this collateral inheritance tax is paid out of the legacy and not out of the general estate of the decedent.

In the case at bar, the executor not having in his hands sufficient funds for the payment of all the legacies, was obliged to bring a suit to sell the real estate, and under the statute he was required to give bond, upon which the National Surety became his surety. One of the conditions of this bond as already referred to, reads that he shall faithfully make payment and account for all moneys arising from such sale according to law. One of the payments that the executor should have made was the payment of the collateral inheritance tax due from each legatee who received proceeds from the sale of this real estate. Therefore, it follows, that when the executor paid out the entire proceeds of this real estate without deducting therefrom the amount due the state of Ohio, on each respective legacy, there was a default for which his surety, the National Surety Company, would be liable.

It was contended at the argument that it was the duty of the executor to proceed immediately to have this collateral inheritance tax ascertained, and that because he failed to do so and did not use the money of the personal estate for that payment, that therefore the surety on the general administration bond was the only one liable.

While undoubtedly it was the duty of the executor to proceed immediately to ascertain this tax, nevertheless, as this tax, as stated above, is due on the right of succession and not on the right of property, this tax could not be ascertained until after the property was sold, for the reason that there might not have been sufficient property to pay the legacies. In that event, the state would only be entitled to receive a collateral inheritance tax on the amount actually paid to each legatee.

In *In re Gihon*, 169 N. Y., 443, 447, the court say:

"Therefore, though the administrator or executor, is required to pay the tax, he pays it out of the legacy for the legatee, not on account of the estate. The requirement of the statute that the executor or administrator shall make payment is prescribed to secure such payment, because the government is

1914.]

State, ex rel, v. Bonding Co.

unwilling to trust solely to the legatee. No one questions that where a legacy is given for a specified amount the tax must be deducted from the amount of the legacy and the balance only given to the legatee."

If no transfer is effected because it turns out that there is no property to transfer, no tax can be collected; and if the legatee renounces the gift and refuses to receive it, no tax can be collected with respect to him because there is no transfer to him. The fact that the tax is payable at the death of the testator controls the question of interest, but certainly controls no other question germane to the point under consideration.

"A testator may direct that the tax on a particular legacy shall be paid out of his estate; nevertheless, in reality, the tax is still paid out of the legacy, the effect of the direction of the testator being merely to increase the amount of the legacy."

In the case of *In re Wolf*, 89 App. Div., 349, affirmed, *In re Wolf*, 179 N. Y., 599, on the opinion below, it was held that where a legatee named in a will, subsequent to the death of the testator, and without intent to evade the transfer tax, renounces the legacy, which thereupon passes to another person under the residuary clause of the will, the legacy is not subject to a transfer tax calculated at the rate at which it would have been taxable if it had been actually accepted by the original legatee, but is taxable at the rate at which it would have been taxable, if it had been originally bequeathed as part of a residuary estate. The transfer tax is upon the transfer or succession, and not upon the property or estate of the deceased.

See also *In re Zefita, Countess de Rohan-Chabot*, 167 N. Y., and *In re Phipps*, 77 Hun., 325, affirmed, *In re Phipps*, 143 N. Y., 641.

Therefore, inasmuch as the amount of the collateral inheritance tax could not have been ascertained until the amount of the legacy payable to each legatee was ascertained, and as the amount payable to each legatee under the will could not be ascertained until the property was sold for the payment of legacies, and as this property could not be sold without a bond being given, and as this bond was given with the National Surety Company as surety, the proceeds of the sale of the real estate, together with the proceeds of the personal estate, both

being necessary for the payment of the legacies, the collateral inheritance taxes due the state, which were ascertained after the sale of the real estate, and the executor neglecting to pay such taxes, made a default in that he did not properly account for both the proceeds of the personal estate and of those realized from the sale of the real estate, and therefore both bonds are liable for such default.

It was conceded on the argument that if both sureties should be found liable for the default of the executor, that they would be liable as co-sureties and in proportion to the respective amounts of their bonds. This was the ruling of the court in *Kehanst v. Daum*, 4 N. P., 366; 6 Dec., 401

The demurrer of the American Bonding Company to the answer and cross-petition of the National Surety Company will be sustained.

INJURY TO HUSBAND FOR WHICH WIFE HAS NO RIGHT OF ACTION.

Common Pleas Court of Lucas County.

EDNA H. SMITH V. THE NICHOLAS BUILDING COMPANY.*

Decided, 1914.

Husband and Wife—Wife Has No Right of Action for Loss of Consortium—Interference with the Domestic Relation Alone Gives Such Right.

There is no right in a wife to recover money damages on account of loss of consortium, due to an accident which has rendered her husband irritable, morose and ill-tempered, and the responsibility for which she places upon the defendant.

BROUGH, J.

This action is brought to recover the damages the plaintiff, Edna H. Smith, claims to have suffered by reason of an injury received by her husband, Floyd J. Smith, through the negligence of the defendant company.

The plaintiff claims that by reason of the injury, her husband has become nervous, irritable, morose, fretful, excitable and ill-tempered and that his mental condition in that regard is growing worse. She claims that she is, and will be, deprived of

*Affirmed by the Court of Appeals without opinion.

1914.]

Smith v. Building Co.

his society, companionship, conjugal affection, fellowship and association by reason thereof, and asks damages in the sum of \$15,000.

A demurrer has been filed to this petition by the defendant company.

Notwithstanding the statutes which have been enacted in the various states looking to the emancipation of the wife from the condition recognized as hers by the early common law, she is still burdened with the duties incident to the domestic establishment. The performance of these duties she owes to the husband by reason of the domestic relations existing between them. Although these are generally denominated "services," they also include care, comfort, companionship, society and fellowship, and such other matters as are included under the head of consortium. It is for the loss of these "services" that the common law grants to the husband a right of action. No such right of action has ever been recognized by the common law as existing in favor of the wife, except in such instances as amount to a wrongful interference with the domestic relation and which necessarily include the element of malice, either express or implied, and then only for such actual damages as are suffered to the right of consortium as distinguished from the broader term of "services," and for such damages by way of punishment as the jury arbitrarily assess for the commission of the wrongful act. There is nothing in the present statutes of this state, or in the statutes of any other state, so far as I have been able to find, that enlarges this right; and in the absence of statutory authority the right does not exist in the wife to maintain such an action. It might be added that the damages in such a case are so remote and hazy and intangible, and their computation by a jury to any degree of certainty so improbable, that a cause of action instituted solely for their recovery is not worthy of serious consideration. And, it might further be said, that the benefit to be derived by the wife from a money judgment upon such a claim would be more than offset by the harm to the domestic relations of the husband and wife if, in the absence of collusion, the wife should testify that the husband in his relation with her was irritable, morose and fretful, excitable and ill-tempered.

The demurrer is sustained, and exceptions will be noted.

ACTION FOR MEDICAL SERVICES RENDERED TO A WIFE.

Common Pleas Court of Hamilton County.

JOHN M. WITHROW v. WILLIAM A. BOONE.

Decided, February 24, 1914.

Husband and Wife—Liability of Husband for Medical Services Rendered to Wife—Where Wife Has a Separate Estate—Medical Services Distinguished From Funeral Expenses—Pleading.

Unless it appears that a wife by special contract bound her separate estate for medical services rendered in her behalf during her lifetime, the husband is not relieved from liability for such services, and the physician may proceed against him without first exhausting her separate estate.

Nelson & Hickenlooper, for the motion.

W. F. Chambers and Kelley & Hauck, contra.

GEOGHEGAN, J.

The plaintiff moves to strike the entire second defense from the answer for the reason that the facts stated therein are redundant, irrelevant and immaterial and tend to confuse the issues.

The petition is in simple form and alleges that defendant is indebted to the plaintiff in the sum of \$470 for medical services rendered by plaintiff to defendant's wife, at the special instance and request of the defendant.

The answer admits that plaintiff performed medical services for defendant's wife and admits that defendant refused to pay for same. The first defense is a general denial. The second defense, which is sought to be stricken from the answer, is as follows:

"This defendant states that at the time plaintiff alleges he performed the medical and surgical services for Rose B. Boone, she was the defendant's wife, and was possessed of a separate estate in her own right, and that all the services performed by

1914.]

Withrow v. Boone.

plaintiff were performed at the special instance and request of said Rose B. Boone, and not otherwise. That the services so performed were during her last sickness, and a part of the expenses of her last sickness; that a short time thereafter, said Rose B. Boone died, leaving a last will and testament, which same was duly probated in the Probate Court of Hamilton County, Ohio, and Mrs. Josephine Hunt was duly appointed and qualified and is now and ever since has been the duly appointed and acting executrix of said estate; that in said last will and testament, in the first item thereof, it was provided, that it was her will that all her just debts and funeral expenses be first paid. That said estate of Rose B. Boone is solvent and fully able to pay any valid claim for medical and surgical services performed by the plaintiff herein, for and on behalf of the said Rose B. Boone, who was at the time aforesaid this defendant's wife, and this defendant avers that said plaintiff herein has wholly failed to present any claim for the said services to the executrix of said Rose B. Boone, prior to the commencement of this action in this court."

In the examination of this second defense it will be observed that the effect of the first sentence is that the services alleged to be rendered were performed at the special instance and request of said Rose B. Boone and not otherwise.

If this is to be considered as an attempt to plead that the said Rose B. Boone, in securing these medical services, intended that the contract was to bind her own separate estate, I do not think the allegations are sufficient. The husband at common law and under the statute is liable for the payment of medical services rendered to his wife, unless there is a special contract between her and the physician whereby she herself becomes liable to pay him. *Toledo v. Duffy*, 13 C. C., 482; *Gunn v. Samuel's Admr.*, 33 Ala., 201; 2 *Kent's Com.*, 7th Ed., 128.

Therefore, it would seem that in order to take advantage of the fact that the wife, by special contract, either express or implied, had bound her own estate, the pleader must plead such special contract.

The fact that the services were rendered at her special instance and request, is not inconsistent with the fact that there was no intention on her part to bind her separate estate, or that

the services were rendered in reliance upon the husband's duty to pay for same.

If, however, the said allegation is to be regarded merely as a denial of the allegation in plaintiff's petition that the services were performed at the special instance and request of the defendant, then the motion to strike, in so far as that allegation is concerned, is well taken, as the denial, being merely a special denial of what already had been generally denied in the first defense and not constituting new matter, is immaterial and redundant. *Simmons et al v. Green*, 35 Ohio State, 104.

This then brings us to a consideration of the materiality of the allegations contained in the second part of the second defense, to-wit, the allegations that the services sued for were performed during the last sickness of Rose B. Boone, that she provided by her will that all her just debts and funeral expenses should be paid, that her estate is represented by an acting and qualified executrix, that it is fully solvent and that the plaintiff has not presented his claim.

The question squarely presented by this language is, is a husband relieved of his common law and statutory liability to pay for medical services rendered to his wife during her lifetime by the death of his wife leaving a separate estate?

Counsel for the defendant claims that he is and cites Section 10714 of the General Code, which in part provides that:

"Every executor or administrator shall proceed with diligence to pay the debts of the deceased, applying the assets in the following order;

"1. The funeral expenses, those of the last sickness, and the expenses of administration."

Counsel for defendant admit that if the wife had lived, the defendant would have been compelled to pay the bill of plaintiff, but insist that the relation of husband and wife having been severed by death and the law of the state having assumed control over her estate for the benefit of creditors, and the payment of the expenses of the last illness being specially enjoined upon the executor or administrator, this relieves the husband of his common law and statutory liability.

1914.]

Withrow v. Boone.

I do not know that this question has ever been squarely presented to any court. I have made a rather exhaustive examination of the authorities, and have not been able to find that the precise proposition has ever been squarely presented to a court.

While, under the so-called married woman's enabling acts in this state, many of the relations of the husband and wife as to property have been greatly changed, nevertheless, the duty of the husband to support his wife and his minor children out of his property and his labor, so strongly declared by the common law, has been carried into the statute and that duty exists today just as firmly intrenched as part of the policy of the law as it did prior to the passage of the statutes referred to above, Section 7997, General Code.

What reason, therefore, is there for declaring that a husband, who would be liable for medical services rendered his wife, if she lived, has by the passage of what is now Section 10714 been relieved of that liability? Furthermore, the duty on the part of the administrator to pay the expenses of the last illness was a duty enjoined by statute prior to the passage of the enabling acts in question.

Can it be reasonably said that upon the enjoining by statute of the duty upon an administrator to pay the expenses of a last illness, it was intended thereby to create a primary liability upon the estate of a deceased married woman, which liability would not have been in existence except for the fact of her death?

Was it the intention of the Legislature, by the passage of the statute fixing the priority in which an administrator is to pay the debts of an estate, to create a liability upon a deceased married woman's estate which she herself could not charge upon her separate estate had she lived, except by special contract? It would almost seem that the very statement of the questions contains their own answers.

A great deal has been said and a number of authorities have been cited in which it was held that the wife's estate is liable for the payment of her funeral expenses. This may be true, but

there is a clear distinction between funeral expenses and expenses of last illness, the first occurring after the death and therefore after the severance of the marriage relation, and the latter occurring during the continuance of the relation. *Freeman v. Coit*, 27 Hun., 447, 450. The same distinction was pointed out in *Moulton v. Smith*, 16 R. I., 126, although the case is not much value as an authority herein, in view of the fact that at the time the physician's bill was contracted the wife was under coverture and unable to contract such a debt, although the court holds that there was nothing in the statute regarding distribution of the assets of an estate that would make the husband liable, but that he was liable under the common law.

However, in this state we have many authorities which not only recognize but affirm the liability of the husband for the funeral expenses, and this despite the statute making the funeral expenses in so far as a distribution of the assets of the estate by the administrator or executor is concerned, preferred claims. *Philips v. Tolerton*, 9 N.P.(N.S.), 565; *Richter v. Richter*, 11 Ohio Dec. Reprint, 337; *Eveland v. Sherman*, 9 N.P.(N.S.), 559; *McClellan v. Filson*, 44 Ohio State, 184.

In the case of *McClellan v. Filson*, *supra*, which was a case wherein exceptions were taken to an account of an administrator, by reason of his allowance of claims for funeral expenses and those of a last sickness in the administration of the estate of a deceased married woman, the court, while laying down the rule that he may properly allow these expenses and pay them from the assets of the estate, nevertheless say at page 187:

"It is urged * * * that at common law there is a duty upon the husband to dispose of the body of his deceased wife by decent sepulture in a suitable place. This is conceded, and it is not intended here to weaken the force of that duty, nor to impair the liability of the husband for the expenses of such burial."

And further at page 189:

"The question is not simply whether the husband is liable as between him and the undertaker, but may not the estate of the

1914.]

Withrow v. Boone.

wife also be liable, and may not the executor, having ordered the expense, be justified in paying the claim from that estate."

And further at page 190:

"True, the wife's property may not be taken for the husband's debt. But if the debt may be treated, as we think in this case it may be, as well that of the wife as of the husband, it would not seem inequitable to allow her estate to bear the burden, though that does serve to exonerate him."

And while the court in that case admits the right of an executor to pay the expenses of the last illness of a deceased married woman, nevertheless, the facts in the case were such as to show that the woman had, by special contract, made the said physician's bill a charge upon her separate estate, and the court further disclaimed any purpose of deciding what was not before it, simply holding that the executor had the right to follow the statute and in so doing was exonerated from any personal liability.

Some doubt has been thrown upon the question by the decision of the Supreme Court of Massachusetts in the case of *Constantinides v. Walsh*, 146 Mass., 281, wherein the court, through Justice Holmes, seems to hold that the funeral expenses of a testatrix were a preferred charge upon her estate, and that therefore a husband paying these expenses might have a remedy over against the estate. However, the court, in passing upon the matter, say at page 282:

"In such a matter, it is not to be presumed that the husband waives his legal rights, and makes a gift to the estate of his wife, in the absence of any expression or other evidence to that effect."

It will be seen, therefore, from the language last used, that the court is attempting to draw a distinction between the duty of furnishing necessities to the wife before death and the duty of burial after death, it being presumed that a man having paid his wife's expenses during life he makes a gift of that to her and therefore can not recover.

I have examined this question with a great deal of care because of its novelty. I can find no case that supports the view that, for the expenses of the last illness of a wife, the husband can make the physician exhaust her separate estate, except, perhaps, where she has by special contract bound her own estate for the expenses.

I do not think that I would be justified in holding the affirmative of the foregoing proposition in the absence of clear authority in support thereof, or of statute expressly providing therefor. I can not believe that it was the intention of the Legislature, in passing Section 10714, to take away from persons rendering such services to married women the right to recover the same from their husbands, nor do I believe that it was the intention of the Legislature to dispense with the legal and moral obligation of a husband to pay for medical attention rendered to his wife simply because the wife happened to die leaving a separate estate.

When this matter was argued a technical question arose as to whether or not the motion to strike or a demurrer was the proper way in which to reach this pleading. In view of the fact, however, that the first sentence of the second defense contains a special denial of the allegation that the services were rendered at the special instance and request of the defendant it would seem that this would be good as against a demurrer because it is a denial, but could be reached by a motion to strike out, from the fact that it is immaterial and redundant, in view of the general denial contained in the first defense. However, counsel, in submitting the matter, waived the technicality of practice and submitted the matter as if a demurrer had been filed.

The motion will therefore be granted.

1915.]

State v. Cox.

ALLEGED MISAPPLICATION OF TRUST COMPANY FUNDS.

Common Pleas Court of Hamilton County.

STATE OF OHIO v. GEORGE B. COX.*

Decided, July Term, 1913.

Criminal Law—Chief Officer of a Bank Not Guilty of Misapplication of Funds of the Bank, When—Money and Funds Distinguished from Credits.

In the prosecution of the president of a trust company for willful misapplication of its funds, with intent to defraud and injure the company, by loaning said funds without proper security to a corporation which proved to be insolvent, a motion lies at the conclusion of the evidence for the state to instruct the jury to return a verdict of not guilty, where the evidence fails to show that the defendant made any of the loans complained of or misapplied any of the moneys or funds of the bank, or any intent on his part to injure or defraud the bank, but on the contrary that he was justified by the information upon which he acted in believing that the loans were good and would be repaid, and complete exoneration of any part he may have had in the matter is found in the action in due course of the executive committee in authorizing the making of these loans and the approval by the board of directors of said loans after they were made.

CALDWELL, J.

At the conclusion of the evidence for the state, the defendant, George B. Cox, moved the court to instruct a verdict of not guilty, upon several grounds, to-wit:

First. That there is no evidence offered by the state showing that this defendant made any loans as alleged in the indictment.

Second. There is no evidence showing any misapplication by the defendant in this case.

Third. There is no evidence even tending to show that this defendant had knowledge of the conditions of the Ford & John-

*Exceptions to the ruling of the court of common pleas dismissed in the Supreme Court December 1, 1914, for failure to file the bill of exceptions within forty days of the rendition of the judgment.

son Company, whatever that condition may be claimed by the state to have been.

Fourth. There is no evidence that the Ford & Johnson Company at the time of the loans complained of did not have sufficient assets to pay all liabilities.

Fifth. There is no evidence of any intention on the part of this defendant to injure or defraud the Cincinnati Trust Company or any other person or corporation.

Sixth. The evidence shows that the money and funds of the bank were not affected by the transactions complained of, but if anything was affected, it was a credit or credits, and there is no charge made in any of the counts in the indictment of any misapplication of the credits of the bank.

Seventh. The evidence shows that the loans complained of were authorized by the executive committee and approved by the board of directors, and for that reason no crime was committed and no misapplication occurred.

As the court understands its duty in the premises, it is to examine with great care the evidence offered in the case and determine as a matter of law as to whether or not *substantial* evidence has been offered by the state against the defendant tending to prove his guilt as charged in the indictment or in any of its counts.

If such evidence has been offered, the motion of the defendant must be overruled, as the case is then one for the consideration of the jury, and the court has neither the power nor the inclination to invade the province of the jury and to usurp its functions; on the other hand, if the state fails to prove any essential element of the crime charged, then it becomes the duty of the court to so declare and arrest the case from the jury, and to order a verdict of not guilty. Such is the settled law of Ohio. *Goodlove v. State*, 82 O. S., 365-375; *People v. Ledwon*, 153 N. Y., 10.

In the case of *Prettyman et al v. U. S.*, 180 Fed. Rep., 43 (the case referred to by the able prosecution, and which was decided by the Circuit Court of Appeals of the Sixth Circuit. and which court determined that the court below erred in not directing a verdict of not guilty as to Prettyman, and reversed

1915.]

State v. Cox.

the case on other grounds as to others), the court quoted from the 173 Fed., at 581, as follows:

“There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt.

“The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt, is not sufficient to sustain a conviction. Unless there is *substantial* evidence of facts which excludes any other hypothesis but that of guilt, it is the *duty* of the trial court to instruct the jury to return a verdict for the accused.”

There is ample authority in this country establishing it as the duty of the trial court to direct a verdict of not guilty if the evidence offered to sustain an indictment is not strong enough to support a verdict of guilty, or is not of such convincing character as to overcome the legal presumption of innocence, for if the facts proven (which for the purpose of the motion will be taken as true) fail as a matter of law to overcome the presumption of innocence, or to show that a crime has been committed, or are so unsatisfactory that the court would set aside a verdict of guilty, then the jury has no function to perform, and it is the duty of the court to act.

The indictment is in nine counts, each charging the defendant Cox and others named with the offense set out. There is no substantial difference between one count and the others, except that each charges a separate loan of money differing in amount and date from the others, and other and important differences occur, but they will not be discussed here, as they have no particular bearing upon this motion.

The counts set forth in effect the following allegations:

First. That the defendants named were officers, directors or members of the executive committee of the Cincinnati Trust Company, a corporation doing business as a commercial bank, savings bank and trust company, which was receiving money on deposit.

Second. That Cox was president, director and a member of the executive committee.

Third. That as such officers, directors and committee, the defendants having power of management, control and direction over the moneys, funds and credits of the trust company, did on the dates charged "unlawfully and wilfully misapply certain moneys and funds" of the said company and did intentionally and wilfully convert the same to the use of the Ford & Johnson Company, and for no use, benefit or advantage of the trust company.

Fourth. With intent to injure and defraud the trust company in a large amount.

Fifth. In the following manner the said George B. Cox (and others as aforesaid), as director and member of the executive committee, loaned and caused to be paid out of moneys and funds of the said Cincinnati Trust Company to the said the Ford & Johnson Company, through the Second National Bank of Cincinnati, Ohio, the sum of \$17,500 (as charged in the first count), which said sum was paid on a certain draft drawn by the trust company upon the Second National Bank (in some instances on the First National Bank payable to the order of the Second National Bank, and in some instances to the Ford & Johnson Company).

Sixth. That the sum loaned was not well secured, or not secured at all, as Cox and others well knew, and that the Ford & Johnson Company was indebted to the trust company in very large sums, largely unsecured, and the Ford & Johnson Company was and had for some time prior thereto been unable to pay its debts, and was unable to pay its then indebtedness to the trust company, as Cox and others well knew.

Seventh. Whereby said sum was lost to the trust company and its moneys and funds depleted to the amount of the loan.

Certain facts will be assumed as established by the court for the purpose of this motion, to-wit:

First. The existence of the trust company and that it was a bank as described.

Second. The official relationship of the defendant to the trust company, as described.

Third. The powers and duties of the defendants in their official relationship.

1915.]

State v. Cox.

Fourth. That certain loans were made to the Ford & Johnson Company on the dates alleged.

Fifth. That in making such loans drafts were made upon other banks, and that no moneys or funds were in fact taken out of the vaults of the trust company.

Sixth. That as to seven of the loans, they were authorized in advance by the executive committee of the trust company, as appears by its records, introduced in evidence by the state.

Seventh. That as to all of the loans, they were approved by the board of directors at its meetings held after each loan, as appears by the minutes.

This indictment was found under favor of Section 44 of the Thomas act (99 O. L., 278), now General Code, Section 12473, which declares that:

“Whoever, being an officer, employee, agent or director of a corporation, incorporated and doing business as a commercial bank, savings bank or trust company, having power to receive, and receiving money on deposit, wilfully misapplies any of the money, funds, credit or property of such corporation, * * * shall be fined,” etc.

The defendant Cox is charged as president, director and a member of the executive committee. As president his authority and duties are fixed by the by-laws and code of regulations of the company, as follows:

“No. 5. *President*.—The president shall be the principal executive officer of the company, and as such shall have the general supervision and direction of its affairs. He shall execute or cause to be executed the orders of the board of directors and executive committee; he shall be *ex-officio* a member of all committees, and shall attend their meetings when requested by the chairman.”

By the by-laws, the executive committee is empowered as follows:

“No. 2. The executive committee shall meet at least once a week and whenever requested by the president. It shall be the duty of the executive committee to supervise and pass upon all loans, investments in stocks, bond, mortgages or other

securities, to examine and approve all loans made by the company, and to approve all contracts."

Section 9782, General Code, provides that:

"A board of directors may appoint an executive committee, to consist of at least three of its members, with such duties and powers as are defined by the regulations or by the by-laws; who shall serve until their successors are appointed. Such executive committee shall meet as often as the board of directors require, which shall be not less frequently than once each month, and approve or disapprove all loans and investments; all loans and investments shall be made under such rules and regulations as the board of directors prescribe."

Section 9729, General Code, provides:

"Minutes shall be kept of the meetings of such executive committee, including records of loans and investments, to be submitted to the board of directors for approval at each meeting. The minutes and records of such committee shall be kept on file."

As to the board of directors, the General Code, Section 9727, provides:

"The corporate powers, business and property of corporations formed under this chapter shall be exercised, conducted and controlled by the board of directors, which shall meet at least once each month."

Attention was called during the trial and upon the argument of this motion to General Code, Section 9754, providing that loans to one person or corporation shall not exceed twenty per cent. of the capital and surplus of the bank, but no penalty is attached to that section, and mere excessive loans or overdrafts are not criminal.

The gravamen of the offense charged is the wilful misapplication of the funds of the trust company by the defendant with intent to defraud or injure the trust company. It is elementary that the act (that is, in this case, the wilful misapplication), and the specific intent (that is, to injure or defraud) must co-exist, or there is no crime.

1915.]

State v. Cox.

If a misapplication were made without intent to injure or defraud, one essential of the offense is missing and the accused is guiltless. It is not alleged nor claimed, but on the contrary it is expressly disclaimed by the counsel for the state in this case, that there was any plan and confederation, combination or conspiracy between the defendant Cox and any of the other defendants, to injure or defraud the trust company by misapplying its moneys and funds; and no evidence was offered of any such conspiracy.

The case then stands as though there were several indictments against the defendants, and each of them is answerable for his own acts, and only such.

This motion will have to be decided by an examination of the acts, knowledge and intent of the defendant as they have been proven by the state.

First. Has the state offered any substantial evidence such as is sufficient to overcome the legal presumption of innocence that the defendant Cox "loaned and caused to be paid out of the moneys and funds" of the trust company the sums charged in the indictment?

The evidence and records of the trust company show that as to seven of the loans described in the indictment, the applications for the same were submitted to the executive committee, and the loan in each of these cases was authorized. As to the remaining two loans, namely, those charged in the fourth and eighth counts, there is no record of such previous action.

In examining the evidence as to the acts of Cox as to these loans, it will be convenient to classify them as follows: First, count No. 1; second, counts Nos. 2, 3, 6 and 7; third, counts Nos. 4 and 8; fourth, count No. 5; fifth, count No. 9.

As to count No. 1, the minutes show that Cox was present at the executive committee meeting October 14, 1910, and at this meeting were also present Mr. Ireton, the attorney for the trust company, who was also a member of the committee then operating the Ford & Johnson Company, which asked for the loan of \$17,500 for pay-roll purposes, and dwelt at some length upon the progress the committee in charge of the Ford & Johnson Company's affairs was making.

The record shows a motion was made to grant the loan, which motion was seconded, and "Upon vote being taken, was unanimously adopted." The entire committee was present except Mr. Davis, and all concurred, as appears by the record, in the action taken after discussion of the same.

No one has testified in the case that the defendant Cox voted for this loan, and it may well be doubted if the mere record showing unanimous adoption is sufficient to establish that fact; but as this count will fall under further consideration, it will be passed for the present.

As to the counts 2, 3, 6 and 7, the minutes of the executive committee show that Cox was present at each meeting involved in them. No motion was made or seconded by Cox; it appears that he presided at these meetings. No aye or nay vote is recorded; all that appears is that a motion was made to make the particular loan, "which motion was duly seconded and carried."

The record shows a sufficient number of the committee was present in each case to pass the motion and loan against the vote of Cox. The record does not show any act of participation by Cox in authorizing any of the loans included in this class.

As to the counts 4 and 8, it does not appear from the minutes of the executive committee that either of these loans was authorized. No evidence is offered to show or tending to show that Cox knew that these loans were made until afterwards. He did not order them nor in any way participate in them, so far as the evidence indicates. No officer or agent of the Ford & Johnson Company has testified that he consulted with Cox about these loans. So that there is an absolute failure to show that he either "loaned or caused to be paid out" these sums.

And as to count 5, the minutes show that Cox was absent from the meeting and could not have participated in the action of the committee, his place being temporarily taken by Mr. Moch, the vice-president.

As to count 9, the evidence is that an aye and nay vote was taken on this loan, and all voted aye except Cox, who voted nay. This loan was made by the executive committee against the vote and wishes of Cox; and can it be claimed he is thereby re-

1915.]

State v. Cox.

sponsible for loaning and paying out the money of the trust company?

It is argued by the prosecuting attorney he is guilty because he did not prevent the loan, despite the action of the committee. But it must be remembered the committee was created for the very purpose of passing loans, and the by-laws made it the duty of the president to carry out the orders of the executive committee.

It is in proof that each of the drafts named in the indictment is signed by the defendant Cox, and it is claimed that he participated in the loans by that fact. The undisputed evidence is that Cox was in the habit of signing as many as fifty drafts in blank at a time for the convenience of the trust company; that no draft so signed was valid unless signed by another officer of the company; that these drafts were left in charge of Mr. Sampson, the auditor of the company, and usually were given to Mr. Phelan, the bookkeeper, to keep during the day in his cage to be used by him as necessity arose in the regular course of the business. Mr. Phelan's positive testimony is that he did not take any one of the drafts to Mr. Cox for his signature, and that so far as he knew Cox never saw any one of them. The testimony is very clear upon this point, and it is proven that the drafts after being filled up and countersigned were not called to Mr. Cox's attention.

Again, when the loans were made there was no direction given to the executive officers of the company as to how it was to be done, whether by taking money out of the vaults, giving a cashier's check, which might be deposited in another bank, or by drawing upon any bank in which the trust company had credit.

The method of doing it was neither directed nor controlled by the executive committee, and so far as the evidence shows, Cox gave no direction as to the matter. He therefore can not be charged with knowledge that the drafts he had signed were being used for these loans.

Upon the first ground stated in the motion, the court is of the opinion that not only is there not substantial evidence against the accused tending to show he loaned or caused to be

loaned the sums charged, but that there is a total failure of evidence to show that he participated in making such loans or any of them.

Second. The second ground of the motion is: "There is no evidence showing any misapplication by the defendant in this case."

It might be sufficient for the court to say that inasmuch as the evidence fails to show any participation in making the loans, it must necessarily fail to show any misapplication by the defendant; but the court has been impressed by certain very important facts which have been proven, tending to show lack of intentional, wilful misapplication of moneys and funds of the trust company, which will be more fully discussed in the consideration of the fifth count of the motion.

Third. Third part of the motion is: "There is no evidence even tending to show that this defendant had knowledge of the condition of the Ford & Johnson Company, whatever that condition may be claimed by the state to have been."

What does the evidence show that Cox knew concerning the financial condition of the Ford & Johnson Company when any of these loans were made? Cox had been president of the Ford & Johnson Company for several years. The testimony is that he never examined the books or entries in the books, though he attended meetings of the company and received a salary. Mr. A. B. Martin was its general manager.

Mr. Powell testified that Martin was very optimistic as to the future of the company and gave very promising accounts of its progress and prospects. Mr. Powell became treasurer in the early part of 1910, and by reason of some financial disfavor into which he thought the company had fallen, he proposed a reorganization and submitted a plan in which a new company was to be organized, which should take over all the assets of the company and its branches, which Powell valued at from three million to four million dollars. Some time later Powell claimed to have discovered some inaccuracies in the former statement of the company which were not known to Cox, and thereupon Cox ordered a thorough audit of the company's assets and gave directions to all of the company's employees to assist the account-

1915.]

State v. Cox.

ants, the Price-Waterhouse Company of New York and Chicago, in making the audit and appraisalment.

Powell stated at one time in New York that Mr. Cox stated to him he did not think the Ford-Johnson Company was any good or ever would be. Powell resigned in August, 1910. Cox resigned in September, and a committee was appointed to run the company; the Price-Waterhouse Company report was made, and it does not appear that Cox ever saw it or read it or knew of its contents except as given in his hearing soon after the report was made, when it was stated that the report showed that the Ford & Johnson Company was able to pay its debts and forty-five cents on its preferred stock. This report was no doubt in the mind of the defendant at all times thereafter.

The report of the examining committee of the trust company was made January 3, 1911, and the chairman of the committee was Mr. Moch, a witness for the state. This report shows loans to the Ford & Johnson Company of \$651,866.22 on collaterals valued at \$415,563.52, leaving a balance of \$236,402.69, as to which the committee say:

"Deducting the total amount of collateral from the loans, there remains a balance unsecured of \$236,402.69, which is more than covered by the value of the plant, and real estate of the Ford & Johnson Company, and which if liquidated we are assured by reports of the expert accountants, will be ample to pay this balance. For further particulars regarding these loans we would refer you to the officers of the company who will explain in detail the plan of reorganization of the Ford & Johnson Company, which it is hoped will eventually and within two years wipe out the entire debt carried by this company." See minutes of the board of directors, January 3, 1911, p. 161.

Cox was present at this meeting and evidently heard this report.

On the part of the state it is claimed the Ford & Johnson Company had lost money in large amounts prior to the resignation of the defendant as president, and that on one occasion he refused Powell a loan for the company, saying it should not "have another dirty dime." Does this expression indicate that he was wilfully attempting to defraud the trust company? It

appears that when the eastern banks refused to extend the notes for \$200,000 which had been given by the company at the instigation of Powell, that this defendant and others endorsed the notes, and the trust company agreed that if the endorsers were required to pay the notes, that they should be reimbursed as provided in the resolution; and that the directors of the trust company, upon the demand of the state banking department, agreed on May 2, 1911, to reduce the Ford & Johnson Company loan to the legal limit and to procure substituted collateral for the Ford & Johnson collateral to other loans.

Does the evidence show the defendant Cox knew the Ford & Johnson Company was unable to pay its debts? Is the evidence consistent with the honest belief that the company not only was solvent, but would be able to continue in business? There is no evidence tending to show Cox was technically familiar with the chair business, or that he was an expert accountant, or that he had any source of information of the Ford & Johnson Company except as above stated.

Whatever may have been the difficulties with Powell, the Price-Waterhouse Company report confirmed Cox and others in their belief that the Ford & Johnson Company was solvent. The report of the examining committee of the trust company in January, 1911, gave further support to this belief. The advice of the attorney for the trust company added strength to it.

It was charged in argument that the defendant is chargeable with knowledge of the actual facts, or that knowledge was imputed to him of such facts, and that what he might have learned, he is presumed to know.

Wharton on Criminal Law, Section 156, says:

"But in all cases the defendant should be judged by the information upon which he acted, rather than the accuracy of his information."

If civil liability will not be maintained against directors of a bank on such imputed knowledge of its affairs, how much less will criminal liability with its greater and ruinous consequences be enforced? *Mason v. Moore et al*, 73 O. S., 275.

1915.]

State v. Cox.

In view of these reports and facts, what did Cox know of the condition of the Ford & Johnson Company when these loans were made? Was Powell right in his valuation, or was the Price-Waterhouse Company right? Was the Ford & Johnson Company solvent? The executive committee was told that the Price-Waterhouse Company found that it was.

Was the real estate ample to pay the unsecured balance? The examining committee thought it was and so reported. Then, by the evidence Cox was informed and had a right to believe the Ford & Johnson Company was solvent. His source of information was reliable, and he evidently relied on it.

Fourth. The next point made is: "There is no evidence that the Ford & Johnson Company at the time of the loans complained of, did not have sufficient assets to pay all liabilities."

Whether this point is very important may be questioned—because if this defendant had reasonable grounds to believe the company did have such assets, even an honest mistake could not render him guilty of an offense, and if he did so believe and loaned money which he believed was in the interest of the trust company, he would not be guilty of any offense.

Fifth. "There is no evidence of any intention on the part of this defendant to injure or defraud the Cincinnati Trust Company or any other person or corporation."

If the evidence fails to show participation by the defendant Cox in making the loans charged, then any intent or purpose he might have had would be immaterial, but the court does not feel justified in disposing of this point in this brief manner. We are dealing with dates and transactions, the last of which is at most two years old.

It is a trite saying that "hindsight is better than foresight." Had the officers and directors of the trust company known that the Ford & Johnson Company was reasonably certain to go to the wall, would they have made the loans? It seems reasonable to infer that the loans would not have been made but for the belief that they would be repaid. Mr. Moch testified that in authorizing and approving these loans, he believed they would be paid and that he had no intent to injure or defraud. He

seems to have had the same information, even greater knowledge of the facts than the defendant. And if he, as the state's witness, says that he believed the transactions were honest and justified by the circumstances and the facts as stated, how can it be said that the defendant is not equally honest and justified in his actions?

The presumption of law is that the dealings of the officers and directors of the trust company, in their relations with it, were honest and that they were innocent of any criminal intent in their actions. *Greenleaf on Evidence*, Sections 34, 40.

In arriving at their intent we must endeavor in our mind's eye to occupy their places and positions as they were at the time of the act; to know what they knew and face the demands and possibly crises as they faced them—in fancy, to be for a time officers and directors of the trust company, in 1910 and 1911, with their duties and responsibilities and with the situation as it was, as we can best ascertain it.

In the language of the great Pinckney:

“If the heart be uncontaminated by corrupt intentions, the man is innocent, for it is motive that qualifies actions. As it will be with *God*, so it is with the man; the latent intention of the heart must be searched.”

The state banking act did not operate on the trust company until April 1, 1910. At that time the Ford & Johnson Company was indebted to the trust company in a large amount. The court will not repeat the evidence as heretofore stated, but will be satisfied by saying that with the reports and information given to the officers and directors, the defendant was justified in the belief and hope that the trust company would be fully paid its loans, and the other company eventually prosper.

The presumption of law that he was innocent of fraudulent intent, which presumption is evidence in his favor, is not overcome by substantial evidence.

It was suggested in argument by the Attorney-General that the defendant and others should have refused to make loans, in view of the supposed critical situation of the Ford & Johnson Company, that \$525,000 had been loaned, and the trust

1915.]

State v. Cox.

company should have refused the money for pay-rolls. And it appears in evidence that the money loaned as charged in this indictment was used by the Ford & Johnson Company for that purpose.

Now it seems that these officers and directors thought it better to make further advances so as to ultimately recover its entire debt. If this were a mistaken policy, no matter how it turned out, if they were honest in their endeavors to save the assets of the trust company, there is no criminal purpose and no fraudulent design.

The intent to injure or defraud must have been co-existent with the fact, and the court is of the opinion that the acts were at least as consistent with innocence as with guilt; and under the authorities the legal presumption of innocence is not overcome.

Upon the question of the good faith of the officers and directors, it may also be considered that they were advised by the counsel for the trust company to make all the loans, and while ordinarily advice of counsel is not a defense, it is relevant on a question of intent to defraud and like subjects; and if it appears that after full disclosure of facts to the counsel he advises a certain course which is followed, his advice given in good faith is a defense.

The attention of the court has been called to the opinion of the referee in bankruptcy in the Ford & Johnson Company, which, in passing upon the validity of some mortgage issued by the company (as the court recollects it) he said in substance that the bank officials believed, and there was reasonable hope that the bankrupt would survive its financial trouble.

Sixth. The next point is, "That the evidence shows that the moneys and funds of the bank were not affected by the transactions complained of, but if anything was affected, it was a credit or credits, and there is no charge made in any of the counts of the indictment of any misapplication of the credits of the bank."

This point raises a question of law only, as the facts are very plain. The indictment charges misapplication of moneys and funds through certain other banks, by drawing against credits in those banks to make the loans. The evidence is that

the trust company had general deposits in the First and Second National Banks, and that drafts were made upon these accounts which were charged to the trust company account, and ultimately the amount of the draft was passed to the credit of the Ford & Johnson Company; that no money or funds were taken out of the trust company's vaults to pay the drafts or any of them or any part of them.

Under this state of facts, does the evidence support the allegations that the defendants wilfully misapplied the moneys and funds of the trust company?

The statute as stated, uses the terms, "money, funds, credit or property." Section 44 of the original act, now General Code 12473, used the plural term "credits," but this was changed to the singular in the code. The original act used the terms "moneys, funds and credits," as they are found in the United States Revised Statutes, 5209.

What was the relation between the trust company and the other banks? Our Supreme Court has said that:

"Ordinarily the relations between a general depositor and the bank is that of debtor and creditor." *Orme v. Baker*, 74 O. S., 337-346.

Again, it has said:

"Money received by a bank on general deposit becomes the property of the bank, and its relation to the depositor is that of debtor and not of bailee or trustee of the money." *Bank v. Brewing Co.*, 50 O. S., 151.

Attention is also called to the latest book on the subject, *Magee on Banks and Banking*, Section 171.

"Money" and "funds" of the trust company was what it had on hand, no part of which was taken for these loans. The company had no "money" or "funds" on deposit with the other banks. It had a credit deposit and checking account and no more.

The decisions construing the language of this statute are very few, but it seems to be generally conceded the terms "money," "funds" and "credits" do not refer to the same kinds or classes of property.

1915.]

State v. Cox.

The Supreme Court of this state had before it the same terms under the free banking act, General Code, Section 12474, in the case of *State v. Davis*, 85 O. S., 43. In deciding that certificates of stock were not moneys or credits, the court gave its unqualified approval to the case of *U. S. v. Smith*, 152 Fed. Rep., 542. In the latter case Judge Evans, in considering the meaning of the terms "money," "funds" or "credits," indulges in quite an elaborate discussion concerning them. He says (p. 54):

"The word 'money' is doubtless equivalent to currency, and its meaning is apparent. But Congress could not have intended that the word 'funds' or the word 'credits' should be construed to mean the same thing as the word 'money' or its equivalent, 'currency,' or that the word 'funds' should be regarded as synonymous with the word 'credits.' The three words do not mean, and evidently were not expected to be construed as meaning the same thing, as mere tautology was not designed. * * * A careful consideration induces the court to agree with Judge Priest in his opinion in the case of *U. S. v. Greve* (D. C.), 65 Fed. Rep., 489, that the words 'funds' has a different meaning from the word 'moneys' as used in the statute. * * *

"The remaining word 'credits' (says Judge Evans), refers to something nearer to the bank's daily business transactions, and should be given a wider meaning from that of either of its associate words. * * *

"But without enlarging upon the reasons for doing so, the court has reached the conclusion that the word 'credits' used in the statute means debts due the bank or promises to it to pay money, namely such as its notes and bills receivable, as distinguished from more permanent investment securities. * * * Stated shortly, the court is of the opinion that the word 'moneys' refers to the currency or circulating medium of the country; that the word 'funds' refers to government, state, county, municipal or other bonds, and the other forms of obligations and securities in which investments may be made; and that the word 'credits' refers to notes and bills payable to the bank and to other forms of direct promises to pay money to it."

This extended quotation is made because of the clearness and certainty of the court's holding. It would seem that the approval of the opinion of Judge Evans by the Supreme Court of this state, leaves this court without any duty but to follow it,

unless it is in any wise affected by an unreported case, in the 86 O. S., 324, *State v. Smith*. The latter case was a prosecution for embezzlement of money under the statute making it an offense to embezzle "anything of value."

The brief for the state, which is the only means the court has of knowing anything of the facts, sets forth that moneys of the employer were drawn from the depository upon checks, and the circuit court seems to have reversed the judgment of conviction.

What induced the judgment of the Supreme Court does not appear, but it is very clear the court was not construing words such as "moneys" and "credits." In that case the defendant was guilty of embezzlement if he converted "anything of value."

In this case the defendants are guilty only in case they willfully misapplied "moneys and funds of the trust company."

In the *Davis* case, *supra*, it was held that certificates are not money or credits, neither is a horse, which the company might own. The defendants are not charged with misapplying credits. The only charge is that they misapplied moneys and funds with intent to defraud; there is no charge that they misapplied a credit with intent to defraud; and if they misapplied species of property not included in moneys, funds and credits, they could not be convicted on an indictment charging moneys, funds and credits.

The description of the property is essential and must be substantially proved. Support for the opinion of Judge Evans is found in a case cited by the prosecuting attorney in the argument, to-wit, *State v. Mispagel* (Mo.), 106 S. W., 513:

"First. In an information for embezzlement or in an information for larceny, the property embezzled must be described and the proof must be in substantial accord with such description.

"Second. A charge of embezzlement or larceny of money is not sustained by proof of embezzlement of a draft or check."

Many authorities are cited in the opinion of the court in accord with it. The *Calkins* case, 18 O. S., 366, does not seem to throw any light on this subject, as the court was there con-

1915.]

State v. Cox.

struing a statute of embezzlement of property under the care of the accused, and held that property stored and subject to his order was "under his care."

The cases of *Territory v. Hale*, 13 N. M., 181, and *Barkley v. State*, 53 Neb., 511, are also referred to by the state, but the court feels it would be bound to follow the decision of the Supreme Court in the Davis case referred to; however in the apparent conflict of authorities, the court does not feel called upon to decide this point, but will place its decision upon other and certain grounds.

The last point in the motion is that: "The evidence shows that the loans complained of were authorized by the executive committee and the board of directors; for that reason no crime was committed and no misapplication occurred."

A corporation being an intangible, an artificial body, can not, as such, perform any physical act, or entertain any intent, or have any knowledge. It, perforce, acts through agencies of one sort or another, and these agencies have certain powers, duties and responsibilities, as has been stated.

General Code, Section 9727, provides that:

"The corporate powers, business and property of corporations formed under this chapter shall be exercised, conducted and controlled by the board of directors."

In *Belting Co. v. Gibson*, 68 O. S., 442-449, it is said:

"In this state the corporate powers, business and property of the corporation *must* be exercised, conducted and controlled by the board of directors. Section 3248, Revised Statutes."

Article 6 of the code of regulations conforms to the statute. The executive committee is charged by statute, General Code, 9728, with the approval or disapproval of all loans, and by the by-law No. 2, this committee is bound to supervise and pass upon all loans and keep minutes, and submit records of loans to the board of directors for approval at each meeting (General Code, 9729). This committee was composed of members of the board of directors. Its members attended board meetings and had before them the same reports, information and knowledge that the board had at the time of any particular loan de-

scribed in the indictment; the executive committee had the advice of the counsel for the company, and it also had, which is most important, and no doubt was most influential in its effect upon them, the unqualified approval of all the loans previously made to the Ford & Johnson Company. The record fails to show any lack of approval by the board of the action of the executive committee, or any dissent from its actions. On the contrary, the loans were approved month by month as they were made by action such as the following:

“The loans and investments made since the last meeting of the board were submitted, and upon motion of Mr. Parrish, seconded by Dr. Heady, same were approved.”

Not one of the loans lacked this approval. If wilful misapplication were made with intent to defraud, it would acquire no validity, if subsequently it were brought to the attention of the board and its approval obtained.

But a different question is presented where repeated and successive loans are made to a person or company, all of which were within the knowledge of the board, and it gives its consent. Such a case is fully within and covered by the language found in *Evans v. U. S.*, 153 U. S., 582, on page 593, as follows:

“If the directors of this bank had authorized their cashier, either generally or in this particular case to discount paper, it was clearly matter of defense.”

The repeated approval of these loans without objection was equivalent to a general authority, if the executive committee was not already vested with the same.

As the court understands it, the state does not deny that the authority of the board of directors to make loans is a good defense. At least, so the court understands the brief of the state on the motion to quash, where it is said:

“Such is the law, settled in the case of *Evans v. United States*.”

But it is claimed the action of the executive committee is no protection to those on the committee, and that the approval of the board is of no effect.

1915.]

State v. Cox.

If this were a case of conspiracy to defraud the company by the officers or the executive committee, or by them, and the directors, there would be some color to the state's position. But the state says there was no conspiracy. It is presumed there was none. None has been proved nor attempted to be proved.

Then are men constituting a board or committee to be held responsible as criminals because they perform the duty for which they are appointed, using their best judgment as to the wisdom of their course?

Judge Taft in the Youtsey case in 91 Fed. Rep., 70, held that it was incumbent on the government to show affirmatively that the board had no knowledge and gave no consent to the alleged misapplication.

Judges Jackson and Sage in the Harper case, 33 Fed., 431, at 479, held to the same effect.

The Supreme Court of the United States, Britton case, 108 U. S., 193, held that:

"If an officer of a bank who was insolvent procured a loan on his note endorsed by an insolvent person, and these facts were known to the directors, and they allowed the loan, it approached the verge of absurdity to charge the officer with wilful misapplication with intent to defraud, because he used the moneys loaned by the board."

Our distinguished Attorney-General, in his learned brief, calls the attention of the court to the case of *Breese v. United States*, 106 Fed. Rep., 685. The court is of the opinion that this is not a case in point and does not apply to this case.

As such negotiations and credits are permitted by the national banking law, and the board of directors or the constituted discount committee, if the transaction undergoes their observation and approval, the vice-president who obtains the benefit of the credit is not culpable, unless he procures the approval of some fraud or deception.

Is there any evidence in this case that the defendant secured the approval of the committee or the board of directors by any deception or fraud?

See also *United States v. Smith*, 152 Fed. Rep., 542, 547.

If the law is that the knowledge or consent of the executive committee or board of directors is a defense, then necessarily if it appear in the state's case that such consent was given, there is no case left to submit to the jury.

The authorization of the loan by the executive committee is a complete defense in this case, and the approval of the board of directors under the circumstances is likewise.

In the Prettyman case before referred to, in 180 Fed. Rep., the court said:

"Gross maladministration, and inexcusable breach of duty on the part of the officers of a national bank in its management, however disastrous to its stockholders, are not punishable unless in violation of the law."

Holding the views of the case the court does, after a long and laborious examination of the facts and the law, there is no course open for it, but to grant the motion of the defendant, upon the grounds:

First. That the evidence fails to show that Cox the defendant made any of the loans or misapplied any of the moneys and funds of the bank.

Second. That there is no evidence offered tending to show an intent by the defendant Cox to injure or defraud the bank.

Third. The evidence shows that the defendant Cox was justified in believing the Ford & Johnson Company was solvent and would repay all these loans.

Fourth. The loans were authorized in advance by the executive committee and approved by the board of directors, which is a full and complete exoneration.

The jury will, therefore, be instructed to return a verdict of not guilty.

Gentlemen of the jury, the court feels it to be its duty, under the law and the evidence in this case, to instruct you to return a verdict of not guilty, and the court so directs you. The clerk will give you the verdict which your foreman will sign and return to the court.

1915.]

State v. Smith.

WHAT ARE SUFFICIENT GROUNDS FOR A CHANGE OF VENUE.

Common Pleas Court of Clark County.

STATE OF OHIO V. ARTHUR B. SMITH.

Decided, January, 1914.

Criminal Law—Change of Venue Rests in the Sound Discretion of the Court—Will be Granted Only on Explicit and Convincing Evidence—Impanneling of Jury Affords Best Test as to Whether a Fair Trial Can be Had.

1. Whether there should be a change of venue in a criminal case is to be determined in the sound discretion of the court, to which application is made for such change.
2. The defendant, who seeks a change of venue, must show by the facts and circumstances, and can not establish by the mere opinion of witnesses that a fair trial can not be had, and the defendant must prove that such trial can not be had by fair, impartial, explicit and convincing evidence.
3. The best test whether a fair trial can be secured, is the demonstration of that fact in the process of impanneling a jury, and if it thus appears, the defendant should then have the privilege of renewing his motion for a change of venue, where the former application has been overruled.

HAGAN, J.

This case has been submitted to the court on the motion of the defendant for a change of venue. The motion is as follows:

“Comes now the defendant, Arthur B. Smith, by his attorneys of record, James B. Malone and John M. Cole, and moves the court to change the place of trial of this cause, and to order this defendant and this cause to be tried in a county adjoining the county of Clark, state of Ohio, for the following reasons:

“1. A fair and impartial trial of this defendant and this cause can not be had in said county of Clark, state of Ohio.

“2. A fair and impartial jury for the trial of this defendant and this cause can not be impaneled in said Clark county, Ohio.

“3. By reason of prejudice pervading said Clark county, Ohio, a jury impaneled in said county can not dispassionately weigh the evidence and render a fair verdict in said cause.

“4. By reason of prejudice pervading said Clark county, Ohio, the witnesses which the defendant herein expects to use at the trial of said cause, will during said trial, if the same be

held in said county of Clark, be prevented and hindered in testifying freely and fearlessly in favor of this defendant."

The motion is made under favor of Section. 11415, General Code, which is as follows:

"When it appears to the court that a fair and impartial trial can not be had in the county where the suit is pending, the court may change the place of trial to some adjoining county. If the application is made in the superior court, the change shall be made to another superior court, or to the common pleas court of an adjoining county."

It is discretionary with the court whether a motion of this kind is granted. *Bank v. Ward*, 11 Ohio Reports, page 128; *State v. Geiger*, 3 O. L. R., 626.

What weight of evidence should be required to sustain a motion for a change of venue in a criminal case?

It was held by Judge Wickham, of the Common Pleas Court of Coshocton County, Ohio, in the decision reported in 7 N.P. (N.S.), page 193, that:

"If it appears from the evidence offered in support of the motion to be improbable that the defendant can secure a fair and impartial trial, or an unbiased and unprejudiced jury, then we think it would be the duty of the court to order a change of venue."

But it is stated by Judge Pfleger, of the Common Pleas Court of Hamilton County, and reported in 16 Ohio Dec., page 581, at page 583:

"A defendant who seeks a change of venue must show by facts and circumstances, that an impartial trial can not be had, and he can not rely upon the mere conclusions of opinions of witnesses that such trial can not be had." Citing *State v. Sandusky*, 48 W. Virginia Reports, 582, in support of the proposition.

Judge Pugh, of the Franklin county, Ohio, common pleas court, in the case of *State v. Elliott*, reported in the 25 Bulletin, at page 366, said in the syllabus:

"To authorize a change of venue in a criminal case on the motion of the defendant, he must prove by clear, explicit and con-

1915.]

State v. Smith.

vincing evidence that a fair and impartial trial in the county where the indictment was found, can not be obtained.”

This ruling was affirmed by a majority of the Supreme Court of Ohio, affirmation being reported in 27 Bull., page 52.

The law of Ohio thus seems to require the measure of proof stated by Judge Pugh, rather than that stated by Judge Wickham, so that the defendant must prove clearly, explicitly and convincingly by the evidence, that a fair and impartial trial can not be obtained in the county where the indictment was found.

What is the evidence offered by the parties respectively, for and against the motion?

Affidavits in chief for defendant have been filed in support of the motion, to the number of fifty.

With the exception of one of these affidavits, which is of counsel for defendant, all are of the same tenor, each affidavit stating in substance that affiant by reason of his own observations, experience and conversations with many residents of this county with reference to this cause, knows that there exists among the people of said county a widespread and general prejudice against the defendant, Arthur B. Smith; that from extensive newspaper reports of past proceedings in said cause, together with many existent rumors and charges against the defendant published and unpublished, and in relation both to this cause and to other matters unconnected therewith, a very large number of citizens of said county have formed the strong and fixed belief that defendant is guilty as he stands charged in the indictment; and affiant believes that the general public sentiment and opinion throughout said county is strongly and firmly fixed to the effect that the defendant is guilty of murder in the first degree, and should receive the severest penalty of the law for such crime; that because of the existent general public sentiment defendant would be greatly hindered and impeded, if not completely prevented, from securing a fair and impartial jury, from securing fair and impartial consideration from the jury during his trial, and from procuring witnesses, residents of said county, to testify freely and fearlessly to facts which might constitute evidence, either direct or indirect, in defendant's favor, and affiant further says

that according to his best and honest belief, by reason of the facts set forth above, that the defendant can not now, and will not in the future be able to have a fair and impartial trial of this cause in Clark county, Ohio.

The affidavit of counsel for defendant states, in substance, that they have been engaged in the preparation of this cause for trial for many weeks last past; that they have interviewed a large number of citizens of this county regarding this cause, and so have acquired a knowledge of the existing public opinion, and the strength of the same, concerning the defendant's alleged guilt; that ever since the indictment of the defendant, the newspapers published and having a wide circulation in Clark county, have published what purport to be full and detailed accounts of the defendant's alleged connection with the crime charged in the indictment, and in connection therewith have given widespread publicity and currency to many and certain rumors wholly irrelevant as testimony in said cause, and as bearing on the guilt or innocence of the defendant, but extremely damaging to the defendant in the effect upon the general sentiment of the community.

They further say there are certain unpublished rumors which have gained wide circulation in this county, wholly irrelevant to this cause, and some of them of the most absurd and slanderous nature, but that affiants aver to be generally credited and believed by many citizens of the community, and which are extremely damaging to the defendant in their effect upon the general sentiment of the community.

They further say that the present state of public sentiment and opinion is so strongly directed against the defendant, that in certain portions of the community he is directly and openly charged with the commission of all manner of crimes and misdemeanors, which the state of Ohio does not and will not seek or attempt to charge against the defendant, but which have secured a certain degree of credence in the minds of many citizens of this county, which could not and can not be removed by any of the ordinary modes of proof; that although the state of Ohio makes no claim as to the defendant's guilt except as charged in the indictment, affiants have repeatedly heard the defendant

1915.]

State v. Smith.

accused by reputable persons in this community, of the murder by poison of certain other persons than the one named in the indictment herein prior to the time charged in the indictment, and such accusations have attained such currency and belief that it would be impossible for this defendant to escape their harmful influence and effect upon the trial of the case at bar, should the trial be held in this county; that affiants have recently endeavored to procure many citizens of said county to make affidavit to their opinion that this defendant can not secure a fair trial of this cause in this county, and have interviewed a large number of prominent citizens thereof; that with three or four exceptions they have found no persons possessing the actual belief that this defendant can be fairly tried in this county; that they have, however, found large numbers of persons possessing such strong prejudice against the said defendant, that while admitting the improbability of a fair trial of said cause in this county, nevertheless refused to make affidavit thereto, expressing the reason that such affidavit would be to the advantage of the defendant, and might result in his acquittal.

Affiants further say that they have interviewed a large number of prominent business men and merchants in the city of Springfield, Ohio, who stated their opinion that the defendant could not be fairly tried in this county, but declined to make affidavit to such belief on the ground that their business would be injured in the community for even expressing such an opinion in the matter; that affiants believe that because of existent general public sentiment hereinbefore described, defendant will be prevented from securing a fair and impartial jury to try this cause; that if he should in any manner be able to secure a fair and impartial jury in this county still by said general sentiment he will be prevented from securing fair and impartial consideration from said jury during the progress of a public trial; that he would be prevented from securing witnesses, residents of said county, to inform his counsel of facts in their knowledge constituting evidence in his favor, and to testify fearlessly and freely to such facts in his favor at the trial of said cause.

Affiants further say that by reason of all of which affiants thus set forth in their affidavit, and according to their best and honest

belief, and after many weeks of attempted preparation of said cause for trial, that the defendant can not now, and will not in the future be able to have a fair and impartial trial of this cause in this county.

Counsel for the state thereupon filed affidavits to the number of 120, all of the same tenor—each stating in substance that affiant has talked with a large number of people living in this county, and has read about this case, and about the death of Florence Cavileer Smith and the alleged cause of her death; that affiant has knowledge of what the general feeling, opinion and sentiment of the people of Clark county is with regard to the defendant Arthur B. Smith, and the death of said Florence Cavileer Smith; that there is no prejudice or ill-feeling among the people living in this county towards the defendant that would in any way whatever prevent him from securing and having a fair and impartial trial in this county, on the charge of murder in the first degree, now pending against him, and that affiant believes that the said Arthur B. Smith can secure a fair and impartial trial in this county on said charge.

Upon the filing of these affidavits for the state, the defendant was permitted, with the consent of counsel for the state, to file additional affidavits to the number of 102, all of the same tenor, each setting forth that the affiant has a wide acquaintance and has talked with a large number of people in the county regarding this cause, and has heard about the case and read a large number of newspaper accounts concerning the same and knows the general feeling, opinion and sentiment of the people of this county in regard to the defendant and his alleged connection with the cause.

Affiant further says he denies that there is no prejudice or ill-feeling among the people living in Clark county, Ohio, against the defendant, but avers that there is such strong prejudice and ill-feeling against the defendant, that it will prevent him from having a fair and impartial trial in this county, and therefore says upon his honest and best belief, that the said defendant can not secure a fair and impartial trial of this cause in this county.

Briefly and concisely stated, the affidavits for the defendant, other than those of his counsel, are that because of newspaper

1915.]

State v. Smith.

reports and unpublished rumors and charges against the defendant, a large number of citizens have the strong and fixed belief that the defendant is guilty, and because of this belief he can not secure a fair and impartial jury or a fair and impartial consideration from the jury, or witnesses to testify fearlessly and freely in his behalf, and therefore that he can not obtain a fair and impartial trial in this county.

The extent of the newspaper reports and alleged unpublished rumors and charges not being specified as to their character, or set forth in the affidavits, the court has no basis on which to form an opinion as to their probable effect on public sentiment.

The affidavit of counsel for defendant repeats the like statement as to published and unpublished reports and rumors in regard to the defendant, without setting forth the publications or the nature of the same, or the alleged rumors or their nature. hence this affidavit falls within the same class as the other affidavits for the defendant.

Counsel in their affidavit, however, further say that in certain portions of the community the defendant is directly and openly charged with the commission of all manner of crimes and misdemeanors, among which specifically, is the murder by poison administered by the defendant, to other persons than the one named in the indictment prior to the time charged in the indictment.

As to the alleged charging of the defendant with other crimes than that named in the indictment, the court takes judicial notice that this is probably true, but that such charges have never been published in the newspapers, and their circulation has been limited to a comparatively small portion of the people in Clark county.

It is to be noted that in none of the affidavits for defendant. is it claimed that any person in the county has stated that the defendant should not have a fair trial, or that if he was sitting as a juror in the case he would not be disposed to give him a fair trial.

It may be true, as stated in these affidavits, that there are some persons who refuse to make affidavit in behalf of the defendant, on this motion, from the fear that an affidavit of that character might be to his advantage, and might result in his

acquittal, and it may also be true that some business men and merchants of the city of Springfield, while believing that the defendant could not be fairly tried, declined to make affidavit to the belief, from fear that their own business would be injured in the community for even expressing such an opinion in the matter. There are always some cautious souls of this class in every community in a great crisis, but the affidavits for the state are entitled to at least equal credence with those for the defendant, and they are each and all equally positive with those for the defendant, but to the effect that affiant has knowledge of the general feeling and sentiment of the people of this county, and that there is no prejudice or ill-feeling of the people of this county that would prevent the defendant from having a fair and impartial trial of this cause, and they believe he can secure a fair and impartial trial.

The court is not impressed with the claim that there is so much prejudice in this community against the defendant, that the testimony of witnesses who know important facts can not be obtained by defendant. If this were true it would not be remedied by shifting the venue to another county, because the same reluctance to disclose the important testimony would exist on the part of witnesses, nor is the court impressed with the idea that there would be such an atmosphere around the jury in the trial of the case as to adversely affect the defendant by reason of its influence upon the jury.

It is but fair to the defendant, however, to state that the court takes notice of the fact that in this as in every case where murder is charged against the defendant, and there is a free publication in the newspapers of the claims made on behalf of the state in regard to the alleged offense, many people in the community necessarily form opinions of more or less strength to the effect that the defendant is guilty of the charge made.

Counsel for both parties, on the oral argument, asked the court to look beyond the affidavits filed in this case in considering this motion, and to take judicial notice of the sentiment in this county, for the purpose of trying to determine whether the defendant could have a fair trial, and counsel for defendant in their brief repeat the request and cite authority to hold that it

1915.]

State v. Smith.

is within the province of the court to take judicial notice of sentiment in such cases.

The court also takes judicial notice of the fact that Clark county is in a normal condition; there is no race war waging in its borders; there are no family feuds, such as embrace whole counties in the mountain district of Kentucky; there is no political division among the people engendering the rancor which sometimes is produced from such causes; there is no war between labor and capital to engender hostile feeling of one class against another; the affidavits do not show, and the court takes judicial notice of the fact that there does not exist any such or kindred conditions by reason of which any large number of people in this county would have a feeling of hostility to the defendant as belonging to the opposite faction or class from themselves, so that they would be disposed to convict him on that account if sitting as jurors in this case, and regardless of the facts and evidence and law of the case.

In other words, there is no hostility or antipathy shown by the evidence as existing in this community towards the defendant, growing out of any cause or causes extraneous to the unhappy occurrences which have led to the indictment against him.

The court takes judicial notice of the sense of American fairness which governs the people of this county, and does not believe that the great mass of its people desire that the defendant shall not have a fair and impartial trial, but in fact, in the hearing of the court, many people have expressed the hope that the evidence would be such in this case as to exonerate the defendant from the charge which is made against him.

With the sifting process of the law and the aid of the able and ingenious counsel of defendant, in this case, the court firmly believes that a jury of the men of Clark county could be made up, the members of which will wholly divest themselves of any opinion previously formed and render a fair and impartial verdict on the facts as they find them to exist, and with the law applied thereto as given by the court.

It may be worthy of note that the able jurist already referred to, in the case of *State v. Elliott* made this remark:

“I am sustained by high authority in saying that a change of venue in many criminal cases has been a positive disadvantage

to the defendant. Not infrequently an impression is created unfavorable to the defendant, from the fact that he felt it necessary to ask for a change, and this impression accompanies the case into the county to which the change is made. The remedy is in many cases the thorough sifting of the jury."

The court, therefore, whether adopting the rule of improbability as laid down by Judge Wickham, or the rule stated by Judge Pugh, requiring clear, explicit and convincing evidence to sustain the motion, is constrained to arrive at the conclusion that the motion should be overruled.

The court, however, does not desire to do an injustice to the defendant, and may be in error in the conclusion which he has reached. The court is therefore disposed to follow the precedent of the case of *State v. Elliott*, in which the principle is stated, with an array of authorities in support of it, that the best test whether a fair trial can be secured arises in the process of impanneling the jury, and that even where affidavits for the defendant make a showing that would justify a change of venue, it is not an abuse of discretion for the court to await such test. The court should ever preserve its attitude of willingness to give the defendant every reasonable opportunity to obtain a fair trial.

The motion of the defendant is, therefore, overruled, but without prejudice to the filing by defendant of another motion for a change of venue while the impanneling of the jury is in process, such motion to be on the sole ground that a fair and impartial jury for the trial of this defendant and this cause can not be impaneled in this county and such motion to be filed only by the permission of the court.

If in the impanneling of the jury the court becomes satisfied that a fair and impartial jury can not be secured, the court will permit such a motion for a change of venue to be filed.

1915.]

State v. Power Co.

**POWER COMPANY SERVING A GROUP OF FACTORIES NOT
A PUBLIC UTILITY.**

Common Pleas Court of Franklin County.

STATE OF OHIO v. THE FACTORY POWER COMPANY.

Decided, January 20, 1915.

*Taxation—Community Arrangement for Furnishing Factory Power,
Heat and Water—Stockholders and Customers Identical—Not a
Public Utility and Not Subject to the Excise Tax, When—Sec-
tions 5415, et seq.*

A corporation organized for the sole purpose of furnishing electric current, heat and water to a group of manufacturing establishments, which does not exercise the power of eminent domain, or make use of streets or public ways, or serve the general public in any way, the stock whereof is owned by the factories served in proportion to the amount of service rendered to each, is not a public utility, but a private corporation, and as such is subject to a franchise tax but not to the excise tax.

Timothy S. Hogan, Attorney-General, for plaintiff.

Moulinier, Bettman & Hunt and Gatch & McLaughlin, contra.

KINKEAD, J.

This action is brought to recover the sum of \$806.46 for taxes and penalty alleged to be due the state. It is averred that the defendant is a corporation, engaged in the business of supplying electricity for light and power purposes, to consumers within Hamilton county and the state, and was so engaged at all times during the year preceding the first day of May, 1912. It is claimed that the defendant is an electric light company within the meaning of Sections 5416 and 5483 of the General Code, and a public utility within the meaning of Sections 5415 and 5470 of the General Code.

The answer of the defendant sets forth facts showing the purpose of its organization, the nature and character of its business.

Its business is carried on in the village of Oakley, Ohio, where a group of manufacturing establishments have located their factories. This group consists of the Cincinnati Milling Machine Company, the Triumph Electric Company, the Cincinnati Bickford Company, the Alvey Ferguson Company, the Cincinnati Planer Company, the Modern Foundry Company and the Cincinnati Lathe & Tool Company.

Each and all of these companies, it is alleged, have been engaged in purely private businesses, manufacturing and selling machine tools, general machinery, motors, conveying machinery, automobile parts and foundry work. For the purpose of economy in the production of power necessary to the operation of the plants and factories of these manufacturing companies, they determined upon a joint power plant located upon the single tract of land on which all of their manufacturing establishments were and are located. It was also determined that the share of each company in the ownership of the joint power plant should correspond to the proportion of use made by the several companies respectively of the power generated by the power plant. For the purpose of facilitating the variations in proportion of ownership to correspond to the variations in proportion of use, it was determined to organize a separate corporation, to be known as the Factory Power Company as the legal owner and operator of the power plant, and the said Factory Power Company is this defendant.

The defendant generates the electric power but does not distribute the same, and each of said constituent companies brings its own wires and conduits to the generating plant of the defendant and at the plant receives the power which it uses. The defendant alleges that it does not now use, and at no time has used and does not intend at any time to use any street, road or other public way for the construction, maintenance or operation of wires, conduits or other transmission facilities. It has at no time and does not intend to exercise any power of eminent domain. It has at no time sold or delivered, or been willing to sell or deliver, or hold itself out as willing to sell or deliver any electric current, power or other service to any person, firm or corpo-

1915.]

State v. Power Co.

ration other than one of its own stockholders, and its own stockholders have at all times been exclusively manufacturing companies with plants located upon the single tract of land; and it is the defendant company's intention to restrict stockholding to such companies.

At the beginning of each fiscal year, the company fixes a scale of rates to be charged for current or other services, which scale is an estimate as accurately as is practicable to make on the actual cost to the company of such current and service. Included in the cost is always an item of 7 per cent. upon the par value, namely of each \$100 of stock in the company. If, at the end of the year, the company's actual receipts during the year exceed the actual cost to it of rendering said service to the said constituent companies, then such excess is paid back to the constituent companies in the exact proportion in which they originally contributed to the receipts. If, at the end of the year, however, the actual cost of the service is found to have exceeded the charges made for the same, then such deficit is charged to and paid by said constituent companies in the proportion of the amounts respectively of service rendered them. If, at the end of the year, it develops that the amounts of service of defendant company to the different constituent companies has not corresponded approximately to the proportion of stock of defendant company owned by constituent companies, then an adjustment of the holdings of the stock of defendant company is made between the constituent companies by the transfer of stock, at par, from one of the constituent companies to the other or others of the constituent companies corresponding approximately to the proportion in which they have during the year used the defendant company's service.

In addition to electricity for both light and power purposes, the defendant company generates steam for heating purposes, and also pumps water from a well located on said tract. All of the above facts relating to the manner of distribution and manner of operation, the fixing of rates and the actual distribution of cost amongst the constituent companies, relates to the furnishing of heat and water as completely and as accurately as to the

furnishing of electric current. The sum of \$58,439.51 represents gross receipts from electric current, heat and water.

The defendant company claims that by reason of the facts alleged by it that it is not an electric light company within the meaning of Section 5416 of the General Code of Ohio, and that it is not subject to the provisions and requirements of Sections 5470, 5474, 5475, 5476, 5481 and 5483 of the General Code of Ohio, and that if said sections apply to this defendant, then said sections are unconstitutional and void, being in violation of Section 1, Article XIV of the Constitution of the United States, in that they deny to this defendant the equal protection of the laws of the state of Ohio, and also in violation of Section 2 of the Bill of Rights of the state of Ohio, in that this defendant is deprived of equal protection and benefit of the government of Ohio, and also in violation of Section 19 of the Bill of Rights of the state of Ohio, in that they constitute a taking of private property of defendant without due compensation, and also in violation of Section 4 of Article XIII of the Constitution of Ohio.

This defendant further says that during each and every year of its existence, including the year preceding May 1st, 1912, the defendant duly made a report to the tax commission of Ohio and its predecessors, as required by the so-called Willis law, being now Sections 5495, 5496 and 5497 of the General Code of Ohio, and both in October, 1911, as well as in all previous and subsequent years, duly tendered to the Treasurer of the State of Ohio, in accordance with Section 5498 of the General Code, the fee required by said sections, and has at all times been ready and willing to pay said fee.

The question is whether a corporation organized by several other corporations for the sole and express purpose of furnishing power—electricity, and also heat and water to each other—the stock in which is exclusively owned by such corporations and is yearly adjusted in proportion to the amount of power used and paid for by each of such corporations; such corporations not using streets, nor exercising the right of eminent domain, nor furnishing the general public with electricity, is a

1915.]

State v. Power Co.

public utility within the meaning of Sections 5415 and 5416, and, as such, subject to the provisions of Sections 5470 *et seq.* for excise taxation.

The question propounded in the Brief of the Attorney-General is whether the company is a domestic corporation for profit, liable for annual reports and payment of fees based upon its issued and outstanding capital stock on the one hand, or an electric company, and a public utility, liable as such to make annual statements of its gross receipts and to pay an excise tax of $1\frac{2}{10}\%$ thereof.

The company is being sued as an electric light company and defends on the ground that its business is not such as to constitute it an electric light company, and that it should be taxed as a domestic corporation for profit.

It is contended that the defendant is organized and conducted so far as the external features of its business are concerned just the same as any other electric power corporation, except that instead of completely distributing power, which it generates itself, those who appear from the outside as its customers own and maintain their own distribution wires. Looking to the internal concerns of the company, it is contended, that it appears that its stockholders and its customers constitute the same body of artificial persons; that is to say, the company generates current at the present time for the use of its stockholders only.

The stock holdings are annually adjusted to the extent of the consumption of the electric current on the part of each stockholder respectively. The aim is not to produce profits; but 7% dividends seem to be figured as part of the operating expenses which are distributed to the stockholders. On the other hand, if the schedule of rates which is annually revised to meet anticipated operating cost, proves insufficient for that purpose, the loss on the year's operation is charged to and paid by the constituent companies in proportion to the amount of current consumed by them.

The Attorney-General although conceding that the status of the company is not exactly normal, nevertheless contends that it possesses every attribute required by the statutory definition of

a public utility and electric light company and should be taxed as such. It is argued that the company is engaged in the business of "supplying electricity;" that there can be no question that the production of electric current and its preparation for transmission so as to be used for light and power purposes, does constitute "supplying electricity" within contemplation of the statute.

It may apparently seem that the defendant corporation is within the letter of Section 5416 because it is engaged in the business of supplying electricity for light. But these statutes must all be considered together, in the light of their purposes, with a view to the objects and purposes of the kinds of corporations to which they relate.

Whether defendant is such a corporation as comes within the meaning of the several statutes providing a system of franchise and excise taxation must depend primarily upon the construction of such statutes. It must depend secondarily upon its purposes, and the nature and character of the business which it carries on. It must depend upon what is contemplated by a *public utility*; upon what is meant by a corporation "engaged in the business of supplying electricity for light, * * * heat or power purposes, to consumers within this state," as contemplated by the enactment.

The objects and purposes of the several statutes providing systems of franchise and excise taxation are to be considered, together with their history.

The history of the legislation relating to franchise taxation of private corporations, and the excise taxation of public service corporations, or *quasi* public corporations, or public utility corporations, is perfectly well known.

It began in 1896 by the enactment of a law (92 O. L., 79) which laid an excise tax upon those engaged in certain enumerated kinds of business of a *quasi* public nature. It had its origin in the public sentiment and demand that those enterprises, in addition to the payment of the property tax, should contribute directly to the revenues of the state. The excise tax laid by that law was upon the operation of the plant or property of the con-

cerns engaged, measured by gross earnings arising from such operation. The original act of 1896 was amended and largely extended by the passage, in 1902, of an act commonly known as the "Cole law" (95 O. L., 136).

At the same time that legislation in response to the public demand for further state revenues from corporations generally was supplemented by the enactment of the "Willis law" (95 O. L., 124), an entirely new enactment providing for a franchise tax upon domestic and foreign corporations other than public utilities. This laid a franchise tax of one-tenth of one per cent. upon the capital stock of all domestic and foreign corporations for profit, except those covered by the "Cole law."

There were numerous amendments to both of these acts in the intervening years, until they finally found their places in the "Langdon act," creating the tax commission of Ohio, passed May 10, 1910 (101 O. L., 399). This was subsequently amended in some respects by the "Nichols law," passed May 31, 1911 (102 O. L., 224).

In codifying the code, the various sections were shifted about somewhat, especially Sections 39 and 40 of the "Langdon act" being placed at the beginning of the chapters entitled: Chapter 5. "Public Utilities. Railroads and Suburban and Interurban Electric Roads"; Chapter 7. "Public Utilities—Cont'd, Express, Telegraph, Telephone, Sleeping Car, Freight Line and Equipment Companies"; Chapter 8. Public Utilities—Cont'd. Excise on Corporations; and "Chapter 9. Public Utilities—Cont'd. Franchise Tax on Corporations."

2780-17 and 2780-18 of the "Cole law" (95 O. L., 136) is to be found in modified form in Section 5416, §40. Its other provisions are to be found in other parts of the chapters.

Section 1 of the Willis law (95 O. L., 124) is to be found at Sections 5495, 5497, 5498.

The exemption clause of electric light, gas "and other *public utilities*" from the operation of the franchise tax of the Willis law was carried in the act creating the tax commission (101 O. L., 399), being Section 101 of that act or 5242-3, Bates R. S. That the purpose was to exempt purely private corporations as

distinguished from public utilities or *quasi* public corporations is clearly evinced in that act by the insertion of the words therein, "and other public utilities."

The original exemption clause of the Willis law as to electric light and other public utility corporations—being Section 101 of the tax commission act, or Section 5242-3 Bates, wherein the amendatory act of May 31, 1911 (102 O. L., 224), was not carried into the General Code in the precise language.

In its place, however, there is to be found a provision of similar import. Sections 5518, being Section 129 of the act in 102 O. L., 224, provides that:

"An incorporated company foreign or domestic, owning or operating a public utility foreign or domestic, and as such required by law to file reports with the tax commission and to pay an excise upon its gross receipts or gross earnings, * * * shall not be subject to the provision of section one hundred and six to section one hundred and fifteen. (G. C., §5495 to §5504.)

Sections 5495 to 5504 constitute the provisions of the Willis law having to do with the franchise tax.

Thus it will be seen that the plan of the present provisions of the General Code relating to assessment of franchise and excise taxes is the same as it has always been.

Purely private corporations only are required to pay the franchise tax.

Quasi public corporations, or public utilities, are to pay excise taxes, but not the franchise tax.

There is a potent reason for this distinction and rule. One kind of corporation does not undertake to serve the general public, while the other conducts a business of such nature and character that the whole people, or general public, is interested in, and must some time or other, or all the time, use.

An electric light company which holds itself out to serve the general public, owes certain public duties, derives greater advantages, and, therefore, greater exactions may be exacted from it. It is a public utility, or public service corporation.

What is to be deemed a public utility must depend upon the nature and character of the business carried on.

The distinction which has always existed in the taxation laws, and which have been thoroughly understood, is unequivocally expressed in the code by the constant use of the word public utility, which was first used in the Langdon act (101 O. L., 399). So that one who runs may read the several statutes on the subject will readily understand what is meant. Particularly is Section 5 (5542-3), 101 O. L., 399, significant:

“Electric light, gas, natural gas, waterworks, pipeline, street railroad, suburban or interurban railroad, steam railroad, messenger, union depot, express, freight line, sleeping car, telegraph, telephone, and other public utilities required by law to file annual reports with the commission,” etc.

And other public utilities is thus inserted in this section exempting electric lights and other companies carrying out the legislative intent and purpose to construe all of the specially named corporations, including electric light companies—as public utilities, to be distinguished from other domestic corporations for profit which are not organized to, and do not hold themselves out to serve the public at large.

This legislative interpretation and construction is in exact accord with the general understanding of bench and bar.

So when we come to a consideration of General Code, Sections 5415, 5416 *et seq.*, there is nothing new contained therein; there is nothing but a shifting of its location. The provision in Section 5416 relating to electric light companies is no different from previous provisions found in the tax commission act. Section 5415 is precisely §39 of the tax commission act, nothing new being contained in it whatever.

But Section 5518 above referred to, containing the exception of the “public utility” corporations, is new and was designed to carry out the distinction theretofore made, and was intended to exempt an electric light company as a public utility from the operation of the franchise tax.

This somewhat labored and detailed review of the statutes has been made to show how the statutes have always, and do still, distinguish between public service corporations and private corporations.

It is perfectly clear from the answer that the defendant is not a public service corporation, that it is not a public utility company, because it undertakes only to render private service to the several private corporations which own its stock. It does not undertake to serve the public in general, nor is it under any obligation to do so.

It is a private corporation, and as such is subject only to the franchise tax.

The demurrer to the answer is overruled. Judgment is entered upon the pleadings in favor of the defendant.

**VIOLATION OF THE SUNDAY LAW BY OPENING A BAKERY
ON THAT DAY.**

Common Pleas Court of Cuyahoga County.

LUDWIG STRAKA V. STATE OF OHIO.

Decided, November 30, 1914.

Sunday Laws—What Constitutes Work of Necessity—Sale and Distribution of Fresh Bread Not Such a Work—Sections 13044 and 13045.

The keeping open of a bakery on Sunday is a violation of Section 13044, notwithstanding only fresh bread stuffs are sold and the community is in the habit of procuring from such bakery on Sunday its supply of fresh bread stuffs for use on that day.

LIEGHLEY, J.

This case came into this court on petition in error from the municipal court of Cleveland, Ohio.

The defendant below was charged with violation of Section 13044 of the General Code in keeping open a bakery store where

1915.]

Straka v. State.

fresh bread stuffs only were sold on Sunday, and the affidavit was in form sufficient to charge an offense under said section.

The defendant was tried and convicted upon the following agreed statement of facts:

“That defendant’s store was open for the transaction of business on the 24th day of August, 1913; that the merchandise offered for sale was fresh bread, fresh rolls, and other fresh-baked goods; that said bread, etc., would have become stale and nearly a total loss to defendant if not sold on said day; that defendant’s customers relied upon him for said necessities of life, and did not have said necessities within their homes; that said day was Sunday; and that defendant did not observe the seventh day of the week as Sunday.”

The following are some of the authorities cited by counsel in their briefs: *McGatrick v. Wason*, 4 O. S., 566; *Stone v. Graves*, 145 Mass., 353; *Aldrich v. Inhabitants of Blackstone*, 128 Mass., 148; *Sullivan v. Railway Co.*, 82 Me., 196; *Topeka v. Hempstead*, 58 Kansas, 328-30; *Morris v. State*, 31 Ind., 189; *Wilkinson v. State*, 59 Ind., 416; *Whitman v. Gilman*, 35 Vt., 297; *Hermendorf v. State*, 25 Tex. App., 597; *Donovan v. McCarty*, 155 Mass., 543; *Emery v. Spencer*, 24 Penn. St., 270; 24 Am. & Eng. Enc. of Law, 542; 10 O. D. Also an unreported case of *Holmes v. State*, decided by Judge Babcock of this court March 10, 1908, a copy of which opinion was furnished this court, in which Judge Babcock held that keeping open a grocery store was a violation.

Section 7033, Revised Statutes (now 13044, General Code), was amended in 1898, by adding to the original section words of more specific prohibition than merely forbidding common labor on Sunday. Almost all of the Ohio authorities referred to by counsel were decided previous to the amendment of this statute, and are therefore not at all decisive of the question submitted in this case.

The plaintiff in error claims that the operation of his store in selling fresh-baked bread stuffs for the immediate needs of that community comes within the exception of a “necessity” under the provisions of Section 13045, General Code.

It is my opinion that "necessity," as comprehended by this section of the statute, with few exceptions, arises from conditions or circumstances caused by an agency, either in whole or in part, over which man has no control. For instance, it has been held that the distribution of milk upon Sunday is a necessity in view of the fact that the production of fresh milk is by Nature's decree daily, and therefore daily distribution of the same is necessary (58 Kans., 328-30). Again, it would doubtless be regarded as a necessity that probably all stores might be open on Sunday, temporarily, following a catastrophe like the Dayton flood, or the Collinwood tragedy. For other instances, see authorities cited above.

In the case at bar, the fact that the plaintiff had in his store on the particular Sunday in question a large supply of fresh-baked bread-stuff was entirely within his control and said food products were there because he baked them and put them there. Also the fact that the community in the immediate vicinity were without a supply of fresh bread, etc., and were in need of the same, was entirely due to the negligence of the people comprising said community in their failure to supply themselves with the same on Saturday night. There was no agency in this situation which was not within the exclusive control of individuals, and the conditions were wholly created by them. If this court should hold, under the facts in this case, that the operation of this bake-shop and store on Sunday came within the classification of "necessity" under said Section 13045, General Code, it would result in granting permission to open all stores on Sunday that deal in perishable or *quasi*-perishable food products, limiting the sales to such goods only.

At the hearing it was strongly urged by counsel for Straka that this is a prosecution of the poor man, earning a living for himself and family with his small corner bakery, while no one ever thinks of prosecuting the wholesale baker who every Sunday delivers to down-town hotels and restaurants.

It is needless to record where my sympathies lie. The wholesale baker is not on trial, and Straka is. The record of the trial

1915.]

Taylor v. Motor Car Co.

below, the statute, and decisions of courts are before me, and it is my duty to follow the law as I understand it to be. If injustice is being done, by virtue of the existence of this statute, to the proprietors of the small corner bakeries, relief must be sought in the Legislature.

The judgment of the court below is affirmed, at costs of plaintiff below.

CONVERSION NOT GROUND FOR ATTACHMENT.

Common Pleas Court of Franklin County.

H. L. TAYLOR v. CROW MOTOR CAR CO.

Decided, October, 1914.

Attachment—Does Not Lie on the Ground the Debt Was Fraudulently Contracted—Where the Rights of the Parties Rest on Contract Rather than Tort.

1. An attachment does not lie on the ground the indebtedness sued on was fraudulently contracted, where it appears that possession of the money which is the subject of the attachment was acquired under the provisions of a contract and title thereto is claimed by the holder under the terms of the said contract.
2. An attachment against a foreign corporation can not be based upon the mere conclusion that the defendant being a foreign corporation is not exempt from attachment; but the affidavit, unaided by the petition, must affirmatively set forth the facts which afford exemption under the statute.

Belcher & Connor, for plaintiff.

Watson, Stouffer & Davis, contra.

KINKEAD, J.

The case is submitted upon a motion to dismiss an attachment on the ground that the affidavit is insufficient in law; that the al-

legations thereof to the effect that the indebtedness and obligations sued upon were fraudulently contracted, are untrue.

Plaintiffs Taylor and Cooke, under a contract with defendants, became agents to sell the motor cars of the latter. Under the contract they deposited \$250 with defendant as a guaranty of good faith. Defendant agreed to apply \$50 of the deposit on each of the first five cars sold by plaintiffs. Plaintiffs sold two cars which were fully paid for and defendant applied \$100 of the amount deposited. The contract thereafter expired by limitation. It is averred that plaintiffs fully complied with the terms of the contract, and that defendant made no objections to the manner of their compliance.

It is then averred that the balance of the amount (\$150) so deposited was wrongfully and fraudulently converted by defendant to its own use and wrongfully and with intent to defraud plaintiffs the defendant converted all of said sum of \$150 to its own use. There is a further similar allegation as to converting \$4.50 paid by plaintiffs to defendants for an automobile spring under a contract to furnish automobile repairs.

The affidavit avers that defendant fraudulently incurred the obligations, in support of which claim they plead the contract made between the parties in so far as it relates to the deposit of the \$250 as a guaranty of good faith.

The affidavit of defendant in opposition to the attachment pleads additional terms of the contract and claims that failure to comply with the conditions thereof warranted it in appropriating the balance of the deposit as and for liquidated damages according to the terms of the contract.

Whether defendant is justified and warranted in so withholding the money deposited by the terms of the contract is not for this court now to decide.

This affidavit and the conditions of the contract and the claim of alleged justification are all sufficient to show that there can be no right in the plaintiffs to an attachment on the ground that the obligation was fraudulently incurred within the statute prescribing that as one of the grounds of attachment.

The rights of the parties clearly rest upon contract, and in no wise sound in tort.

1915.]

Taylor v. Motor Car Co.

For these reasons it is clear that plaintiffs are not entitled to the attachment which they have obtained in this case.

That the kind of fraud that gives ground for attachment is not present in a transaction where there has been a conversion of property is supported by authority. 4 Cyc., 414; *Bank v. Ins. & Trust Co.*, 1 Disney, 469; *Sunday Mirror Co. v. Galvin*, 55 Mo. App., 412; *Finlay v. Bryson*, 84 Mo., 664; *Goss v. Comrs.*, 4 Cole., 468; *Hughes v. Lake*, 63 Miss., 552.

The fact that the money came into the hands of the defendant rightly under a contract, and that it claims it under the terms and conditions of the contract, is conclusive on the question of alleged fraudulent purpose. It demonstrates that the rights of the parties are to be worked out by the contract and the performances thereunder.

As a ground for the attachment it is averred in the affidavit that "the defendant is a foreign corporation, and it is not exempted from attachment as such; that said defendant is not a resident of the state of Ohio."

The assertion of this ground of attachment, it is contended, is an attempt by plaintiffs to claim that the defendant being a foreign corporation and not having complied with the statutes relating to corporations doing business in the state, it is therefore subject to attachment in this case on the ground that being a foreign corporation it is not exempted from attachment as such not having complied with the laws of the state authorizing certain classes of corporations to do business in Ohio.

The question presented by the motion to discharge is whether the form of allegation in the affidavit sufficiently negatives the language of Section 11819 and shows that defendant as a foreign corporation is of that kind or class that do not come within Section 183 requiring compliance with the statutes as to registration.

It is stated in *Leavitt v. Rosenberg*, 83 O. S., 230, 239:

"The statute does not provide for an attachment against all foreign corporations, but only on those that do not come within the exceptions, so that it is not necessary to negative the exceptions in order that it may appear that the fact that the corporation is a corporation is a ground of attachment."

The question here made is how the exception shall be negatived, whether in the language of the statute, or whether, as in a pleading, the facts shall be stated "in the affidavit which will show that the corporation is organized for profit and does not own or use a part or all of its capital or plant in this state." It is only that class of corporations that are authorized to do business under either Section 178 or 183 of the General Code, that are exempt from attachment.

The allegation that defendant is a foreign corporation and is not exempted from attachment as such is a mere conclusion. The affidavit must affirmatively show the facts that the corporation is neither of the class embraced within General Code, Sections 178, 183, in order to support an attachment. The affidavit is not aided in this respect by the petition. See *Edwards Mfg. Co. v. Mill Co.*, 11 C.C.(N.S.), 479; *Edwards Mfg. Co. v. Mill Co.*, 6 N.P.(N.S.), 1.

Conclusions of law have no more force and effect in an affidavit than in a pleading, and encouragement must not be given them.

The motion to dissolve the attachment is sustained.

1915.] Manufacturing Co. vs Manufacturing Co.

**EXTENT TO WHICH COMPETITION MAY BE CARRIED ON BY A
VENDOR OF GOOD WILL.**

Superior Court of Cincinnati.

**THE CROWN OVERALL MANUFACTURING COMPANY V. THE LEVY
OVERALL MANUFACTURING COMPANY ET AL.**

Decided, December 5, 1914.

*Good Will—Restrictions on a Vendor Organizing a Competing Business—
Notwithstanding the Absence of a Stipulation Not to Re-engage in a Similar
Business—Injunction Against Inducing Employees of the Old Concern to
Take Employment with the Competing Business.*

1. The vendor of the good will of a business, while retaining, in the absence of an express stipulation to the contrary, the right to re-engage in a similar business, may not directly solicit business from known customers of the old firm, and an attempt on his part to do so will be enjoined by a court of equity.
2. Where the vendee of the good will organizes a corporation and transfers thereto all his right, title and interest in and to the property and good will of the old concern, the right which is by law conferred upon him to prevent interference with former customers devolves upon the newly organized corporation and may be enforced by it; and where the vendor of such good will thereafter organizes a corporation which engages in a similar business, such newly organized corporation will be bound by the same obligations with reference to such interference as those which devolved upon the vendor.
3. The vendor of the good will of a business will be enjoined from endeavoring to induce former employees of such business to leave its employ and to join him in a competing business.

Judson Harmon and Oscar A. Berman, for plaintiff.

Lawrence Maxwell, Jos. S. Graydon and Cohen, Mack & Hurtig, contra.

OPPENHEIMER, J.

About eleven years ago Oscar Berman and Samuel Levy formed a partnership under the firm name of Berman & Levy

for the manufacture and sale of overalls. The business, which was generally conducted under the name of the Crown Overall Company, grew apace, until during the year 1913 the gross sales aggregated nearly \$1,000,000. On or about the 20th day of December, 1913, the partnership was dissolved by mutual consent, Berman buying the interest of Levy, and paying therefor the sum of \$115,000. Of this sum \$15,000 was understood to represent the value of Levy's interest in the good-will, and the bill of sale which was executed by Levy at that time recited that he conveyed to Berman "the good-will of said partnership and all other property and assets of every kind and nature whatsoever." The sum of \$15,000 was paid to Levy in cash at the time of the transfer, and the balance of \$100,000 was, by agreement, to be paid in weekly installments of \$2,000 each, and was evidenced by notes which were to be secured by stock in a new corporation to be organized by Berman. Shortly after the transfer was made, the plaintiff company was organized by Berman, who transferred to it all the property and good-will owned and acquired by him. In consideration of such transfer, Berman received stock of the plaintiff corporation, which he now holds.

Some time thereafter Levy organized the defendant corporation, with himself as president and chief stock-holder, and this corporation is now engaged in the same business as that in which plaintiff corporation has been engaged.

The firm of Berman & Levy had, during practically all of its existence, employed three methods of soliciting business. The first method was that of sending to various retail dealers in the western part of the country samples which were to be paid for if retained by them. The second method was that of solicitation through traveling salesmen in the states of the Mississippi valley. The third method was that of sending advertising matter to proposed customers. These methods of securing business were followed by the plaintiff corporation. Shortly after the defendant corporation was organized, the same methods of solicitation were adopted by it. The principal question which is

1915.]

Manufacturing Co. vs Manufacturing Co.

now presented to us for our consideration concerns defendant's right, by the methods thus indicated, to solicit customers of the old firm of Berman & Levy. Before answering this question, it will be well to review a portion of the testimony with a view to determining whether defendant's methods were those of fair, legitimate competition, or of deliberate, wilful and improper interference.

Among plaintiff's employees was one Harry Hoemmelle, who had been employed as a draughtsman and cutter for more than five years. He was induced by defendant Levy to leave plaintiff's employ and to enter the employ of defendant. Various witnesses testify that prior to the time when he severed his connection with plaintiff's company, he made measures of patterns belonging to it, and noted these measurements in a memorandum book which he retained in his possession. Hoemmelle did not take the witness stand to deny these allegations. The result of his work is apparent from the fact that the overalls produced by the defendant company and designed by Hommelle are in manifest imitation of plaintiff's product. It is quite true that the designs for these overalls are neither copyrighted nor patented, nor is it contended that defendant may not produce overalls which are similar in appearance to those which are manufactured by plaintiff. But the fact of conscious and deliberate imitation is a circumstance which reflects pertinently upon the fairness of defendant's competition, when samples are sent directly to those who must have been known to defendant to be customers of plaintiff. Moreover, the testimony indicates that when defendant desired to have circulars printed for advertising purposes, it sent for the printer who had originally furnished the circulars used by the old concern, and made inquiry concerning the prices of circulars substantially like those which were used by plaintiff. And the circulars which were ultimately prepared for defendant's use were similar in all respects to those which plaintiff had used. There could not have been even as much excuse for this as for the imitation of overalls, for manifestly no economy was effected by such simulation excepting in mental effort.

The testimony further shows that printed order blanks were sent out with the circulars. In the printing of these blanks, the very electrotypes which had been bought, paid for and used by plaintiff, were, at defendant's request, employed by the printer. No more patent effort to appropriate the fruits of another's brain can be conceived. Levy's explanation that he himself had assisted in preparing these order blanks is answered by the statement that so far as they had become the property of the old firm of Berman & Levy, he had parted with all rights in them, and received compensation therefor. He can scarcely be permitted both to "eat his cake and have it too."

The impression which defendant desired to convey to plaintiff's customers to whom such samples and printed matter were sent, can readily be conceived. Defendant, however, contends that there was no misrepresentation that it had succeeded to plaintiff's business and no imitation of the buttons, tickets or other marks upon the overalls. The truth of such contention is more apparent than real. The lot numbers employed by defendant were in most cases similar to or identical with the lot numbers which plaintiff had continuously used. The garment tickets which were attached to the overalls made by defendant are suspiciously similar in color to those employed by plaintiff to designate lots of similar numbers. It is more than passing strange that with all the colors of the rainbow from which to choose, defendant should have selected blue, or a combination of blue and red, for tickets to place upon overalls strikingly similar to plaintiff's product upon which tickets of the same color were used. And when all these facts are considered in connection with the subscription of Samuel Levy's name to letters which were sent to former customers of plaintiff, the conclusion is inevitable that a studious effort was being made to induce the belief that defendant's overalls were proper substitutes for those previously made and sold by plaintiff and by the firm of Berman & Levy. We are aware that under present economic conditions it is the purpose of the law to foster competition. Acting upon this principle

1915.]

Manufacturing Co. vs Manufacturing Co.

Congress has enacted the Sherman Anti-Trust law, and the General Assembly of this state has passed the Valentine act. But the competition thus fostered and encouraged must be legitimate. With the unfolding of our social conscience, the ethical standard in the business world is being elevated.

We are demanding honesty of method and integrity of purpose in our industrial life. Misrepresentation and fraud elicit public condemnation. One who seeks to gain the confidence of the people must offer as a foundation for such confidence the merit of his own product and the honesty of his own methods. He can not in good conscience offer as his own that which he has not himself produced and which he has obtained by unconscionable means from those whose wares he seeks to displace. He can not reap where he has not sown, nor earn his profits in the sweat of another's brow. It is perfectly apparent that defendant's methods are reprehensible, and that plaintiff is entitled to an injunction which will prevent the unfair competition in which defendant is engaged.

We are, however, asked to take a broader view of the situation and to enjoin generally the solicitation of customers of the old concern by the defendant company, its officers, agents and employees. That is to say, we are requested to treat this case not merely as one of unfair trade competition, but as one in which defendant is violating contractual rights which arise by necessary implication out of the sale of Levy's interest in the good-will of the firm of Berman & Levy. The chief contest in this case has been waged about this point, and it thus becomes necessary for us to consider the Ohio law upon the subject.

As heretofore stated, Levy sold to Berman his interest in the good-will of their joint business. Good-will may be defined as the favorable reputation which a business has established, resulting in a disposition of people to patronize such business, and in the consequent probability that the business will retain its established custom and ultimately enlarge it. In other words, it is the advantage which attaches to an established business by reason of the fact that it has regular customers whose needs

are supplied by it and whose confidence it has been able to secure.

Now it appears to be uniformly held in this country that the vendor of the good-will of a business may, in the absence of any agreement to the contrary, engage in a similar business in the same locality. He may advertise in such manner as he sees fit, and may deal without restriction with those who come to him as a result of such advertisement. But this is not tantamount to saying that he may, after selling his interest in the good-will and receiving adequate consideration therefor, solicit those who have been customers of the old concern and thus seek voluntarily to diminish the value of that which he has sold.

Curiously enough, the leading case in this state arose in this court, and counsel in the case at bar were intimately concerned with its disposition. The leading counsel for plaintiff then sat upon this bench and participated in the decision, and the leading counsel for defendant represented one of the parties litigant. The case is that of *Burkhardt v. Burkhardt*, reported for the first time in 5 O. D. Rep., 185. The court says, at page 193:

"The good-will of a business is a probability or chance that the customers of the old firm will choose and continue to deal with the successor, and that from such advantage it will increase its business with the growth of the community.

"From this it is clear that nobody owns such customers; that they may purchase and sell and deal where and with whom they choose; and if the person selling such good-will has done nothing to induce them to come to him, beyond making the fact generally known that he is carrying on such business, and where he carries on the same, or if he does nothing to keep them in ignorance of the fact that he has sold such good-will, he may deal with them without subjecting himself to any legal or equitable claims, by the person to whom he has sold such good-will. It is the mere probability or chance of the old customers choosing to continue to deal with him, that the purchaser of the good-will buys; and if they do not so choose he has no legal grounds of complaint.

"But it by no means follows that such seller of the good-will, when he again engages in the same kind of business, in the same place, may rightfully do all that any other merchant may in competing with the old firm for the old business. He has sold

1915.]

Manufacturing Co. vs Manufacturing Co.

something and been paid for it, other traders have not. He is either bound to observe some line of conduct different from an ordinary merchant, or he will be getting something for nothing. He must relinquish some rights and privileges with regard to the old trade, or the promise to pay him for it is without consideration, and would not be enforceable on that account. But good-will, though intangible, is property, and often valuable property—it is the very atmosphere that envelopes and pervades a business and that gives it the breath of life.

“Our conclusion is that a person selling such good-will and rightfully engaging again in such business, may advertise the fact to all the world and invite it to come and deal with him; but that he must refrain from specially applying to and urging and holding out special and designed inducements to the customers of the old firm to leave it and deal with himself. That tends directly to destroy or take away the chance or probability which he has sold and for which he has been paid. As to that he must be *passive*, except as we have stated above, and act in perfect good faith toward the house to which he has sold such good-will.”

The judgment of this court just referred to was reversed in 36 O. S., 261, but the principle with which we are here concerned was left entirely undisturbed. The reversal was upon the sole ground that there had been error in calculating a separate value for the good-will and in fixing the damages to which the plaintiff was entitled. The case was again tried before this court and reported in 8 O. D. Rep., p. 496. The court says (pp. 497-8):

“Some things, however, have been definitely settled, and among others, that the vendor, in the absence of any covenant to the contrary, may carry on a similar business, and may deal with the old customers, *provided he does not solicit their trade.*”

And the court then proceeds to explain that plaintiff's right to damages is based solely upon the fact that defendant had solicited customers of the old concern. The court uses the expression, “it is not solicitation, but successful solicitation, that gives damages,” and this expression is approved by the Supreme Court in the next report of the case in 42 O. S., 474. It is apparent that if it is successful solicitation which creates the right

to damage, then successful solicitation is violative of the vendee's legal rights. And as all solicitation is intended to be successful, it follows that all solicitation is forbidden. The very measure of damages fixed by the Supreme Court—the difference in value between good-will without and with solicitation, indicates conclusively the illegality of solicitation.

In the case of *Moody v. Thomas*, 1 Disney, 294, decided by this court in general term in 1857, the court says (pp. 298-9):

“There being no stipulation to the contrary between the parties, either express or implied from their conduct at the time of sale, the retiring partner was under no legal obligation to cease from business altogether, nor yet to induce or prevail upon the old customers of the establishment to continue to deal at the old place. He ought not, in good faith, directly to interfere with the customers of his vendee, but he is not bound to do anything more.”

In the case of *Richardson v. Westjohn*, 6 O. D. Rep., 1043, decided by this court in general term in 1881, it is said:

“In the time of Lord Eldon, good-will was restricted to a mere right to be a successor of the old firm, and nothing was an infringement of it but a representation by an unauthorized person that he represented the old firm. But now the law is, as stated by Sir George Jessel, that where a man has sold a thing, the seller has no right to take back that thing which he has sold and been paid for; and therefore, where an establishment with the stand and good-will has been sold, if the seller undertakes to solicit and draw away from the old firm the established customers of that firm, he is trying to take back to himself the thing which he has sold and been paid for.”

But counsel for defendant contend that the rule thus apparently established by the Ohio decisions has been subverted by the Supreme Court in the case of *Brass Works v. Payne*, 50 O. S., 115. It would, indeed, be strange if a deliberate decision of that court were overruled in a case in which the same question was not even involved. A careful examination of the *Payne* case will conclusively indicate that the question now presented for our consideration was not then at issue. The case was one

of unfair trade competition by the use of a trade name which worked an injury to plaintiff. The court specifically states (p. 117) that "the single question of law presented by the record is whether or not where a partnership is dissolved, one partner transferring to the others all his interest in the firm business and assets, with the understanding that the others are to succeed to the business of the old firm and carry it on at the old stand, but not to use the old firm name beyond a specified time, the retiring member can lawfully use that name in a similar business thereafter carried on by him in the vicinity." The case can not be said to decide anything except "the single question of law" presented to the court; and the gratuitous statements concerning the rights of one who has "parted with his interest in the firm name only," however worthy of our respect, can not offer a safe guide to the perplexed. They can only point the futility of *obiter dicta*. Moreover, the statements thus referred to were apparently predicated upon the decision in the case of *Pearson v. Pearson*, 27 Ch. Div., 145, which was subsequently overruled in the case of *Trego v. Hunt*, 1896 App. Cas., 7.

We are therefore of opinion that the law of this state requires us to hold that one who disposes of the good-will of a business and receives adequate compensation therefor, bars himself from thereafter soliciting customers of that business and thus diminishing or destroying the value of that which he sells.

We shall also examine a few of the decisions in other jurisdictions in order to ascertain whether they are in accord with that which we believe to be the Ohio rule. One of the most recent of these is the case of *Von Bremen v. MacMonnies*, 200 N. Y., 41. The second syllabus reads:

"A purchaser for a valuable consideration, on a voluntary sale of the good-will of the business of a firm, may enjoin former members thereof from soliciting business from the customers of the old firm."

A valuable note is appended to this case in 21 A. & E. Ann. Cas., 423, in which the subject now before us is treated at great length.

The same rule is laid down in the case of *Ranft v. Reimers*, 200 Ills., 386, where it is held that a seller who conveys and warrants the good-will of a business may be enjoined from soliciting old customers upon re-engaging in the same business.

In the case of *Zanturjian v. Borrnazian*, 25 R. I., 151, it was likewise held that the vendor of the good-will of a business, while retaining the right to re-engage in a similar business in the same neighborhood, has no right to attempt to secure the patronage of the old customers, or to induce them not to deal with the vendee.

In the case of *Gregory v. Spieker*, 110 Cal., 150, which presents some rather close analogies to the case at bar, it was held that the manufacturer of a patent medicine, who sold all his right, title and good-will thereto, would be enjoined from manufacturing and vending a similar compound under an entirely different name, and representing it to be superior to the original medicine.

In the case of *Fairchild v. Lowry*, 207 Mass., 552, it was held that a person who has been carrying on an insurance business, and who sells the business without agreeing not again to engage therein, though he may thereafter pursue the same vocation and use his own name, may not derogate from the effect of the sale by soliciting business from former customers.

In the case of *Althen v. Vreeland*, 36 Atl. (N. J. Chanc.), 479, it was held that a person who sells his interest in the property and good-will of a firm will be restrained, on engaging in a rival business, from soliciting customers of the firm to deal with him or not to deal with the purchaser. The court says (p. 481):

“This doctrine is put upon the ground that these acts are direct and intentional dealings with the good-will sold, and efforts to destroy it, in which the vendor takes advantage of the business connection of the old firm, and his knowledge of that connection.”

The same question came again before the same court in the case of *Snyder v. Burton*, 80 N. J. Eq., 185, and it was again

1915.]

Manufacturing Co. vs Manufacturing Co.

held that a person who has sold the good-will of a business may, unless he has otherwise covenanted, set up a rival business, but that he may not solicit the custom of those who have previously dealt with him.

In the case of *Acker, Merrall & Condit Co. v. McGaw*, 144 Fed., 846, it was likewise held that one who sold and transferred the good-will of a mercantile business would be enjoined from attempting to entice away employees or solicit customers who were such at the time of the sale to trade with the competing firm organized by him. The court says (p. 865):

“It would be a reproach to the law if no adequate remedy could be afforded for the protection of a property so valuable as such a good-will against the vendor who has sold it, and who afterwards attempts to regain it to the damage of his vendee.

“As the continued patronage of the customers of such a business is what makes the good-will of value, and as it is utterly repugnant to the contract by which it was assigned that the vendor should be allowed to seek to regain it by soliciting the customers to come back to him, and as the damage thus inflicted is irreparable * * * I think a court of equity should not hesitate to grant a remedy by injunction.”

The same principle is applied in the case of *Myers v. Tuttle*, 183 Fed., 235.

The leading case in England is that of *Trego v. Hunt*, *supra*. This case was decided in the House of Lords on December 5th, 1895; and as many of the very recent cases in this country are expressly predicated upon this decision, we shall quote from it at some length. It was held that where the good-will of a business is sold, without further provision, the vendor may set up a rival business; but he is not entitled to canvass the customers of the old firm, and may be restrained by injunction from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor and not with the purchaser. The House of Lords reviews all the preceding cases, including that of *Pearson v. Pearson*, *supra*, which is expressly reversed. Lord Herschell, delivering the principal opinion, says (pp. 20, 21):

"I think it must be treated as settled that whenever the good-will of a business is sold the vendor does not, by reason only of that sale, come under the restriction not to carry on a competing business. * * * It does not seem to me to follow that because a man may, by his acts, invite all men to deal with him, and so, amongst the rest of mankind, invite the former customers of the firm, he may use the knowledge which he has acquired of what persons were customers of the old firm in order, by an appeal to them to seek to weaken their habit of dealing where they have dealt before, or whatever else binds them to the old business, and so to secure their custom for himself. This seems to me to be a direct and intentional dealing with the good-will and an endeavor to destroy it. * * * It is true that those who were former customers of the firm to which he belonged may of their own accord transfer their custom to him; but this incidental advantage is unavoidable, and does not result from any act of his. He only conducts his business in precisely the same way as he would if he had never been a member of the firm to which he previously belonged. But when he specifically and directly appeals to those who were customers of the previous firm he seeks to take advantage of the connection previously formed by his old firm, and of the knowledge of that connection which he has acquired previously, to take that which constitutes the good-will away from the person to whom it has been sold and to restore it to himself. * * * It is not material to consider whether, on the sale of a good-will, the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate what he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold to him and to restore it to the vendor. I am satisfied that the obligation exists, and ought to be enforced by a court of equity."

Lord MacNaghten reading a concurring opinion says (pp. 24, 25):

"Often it happens that the good-will is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money. * * * He (the vendor) may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may set up where he will. He may push his

1915.]

Manufacturing Co. vs Manufacturing Co.

wares as much as he pleases. He may thus interfere with the custom of his neighbor as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value. He must not make his approaches from the vantage ground of his former position, moving under cover of a connection which is no longer his. He may not sell the custom and steal away the customers in that fashion. That, at all events, is opposed to the common understanding of mankind and the rudiments of commercial morality, and is not I think to be excused by any maxim of public policy. * * * A man may not derogate from his own grant; the vendor is not at liberty to destroy or depreciate the thing which he has sold; there is an implied covenant, on the sale of the good-will, that the vendor does not solicit the custom which he has parted with; it would be a fraud on the contract to do so. * * * It is not right to profess and to purport to sell that which you do not mean the purchaser to have; it is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own."

Defendant attaches much weight to the opinion of the Supreme Court of Michigan in the case of *Williams v. Farrand*, 88 Mich., 473. In that case there was no grant of the good-will *co nomine*. Indeed, the vendors of their interest in the old business specifically refused to execute the bill of sale which was originally drawn, because it purported to include the good-will. The court practically follows the narrow interpretation of good-will as given by Lord Eldon in *Cruttwell v. Lye*, 17 Ves. Jr., 335. The court likewise relies largely upon the English case of *Pearson v. Pearson*, *supra*, which has since been overruled. The lengthy dissenting opinion of Chief Justice Champlin, citing, among other cases, *Burkhardt v. Burkhardt*, seems to arrive at a far more logical and just result than the majority opinion. Moreover, the fact that the *Burkhardt* case is relied upon by the chief justice as supporting his view indicates that he has interpreted it as we are interpreting it now.

A number of other decisions have been cited by counsel for the defendant, but we think that in most cases they merely support

the general proposition which we admit to be true, that the vendor of the good-will may enter into an opposition business and solicit trade generally. In some of the cases, however, as for instance that of *MacMartin v. Stevens*, 37 Wash., 616, a view contrary to ours is taken. In the last case the court refused to follow the Ohio rule, though counsel for appellants cited the Burkhardt and Richardson cases to which we have already referred. But even in that case we do not understand that the court sanctioned deliberate interference with the patrons of the former business.

We are, then, of opinion that defendant Levy, having sold to Berman his interest in the good-will of the business theretofore conducted by both of them jointly, should be restrained from soliciting the customers of the old concern either by sending samples to them, by having salesmen call upon them, or by sending advertising matter directly to them.

We do not think that the rights of the parties are in any way affected by the fact that Berman has transferred the business and good will owned by him to the plaintiff corporation, or that defendant Levy subsequently organized defendant corporation, in whose name the acts complained of are being done. We do not believe that any subterfuge should be permitted, the result of which would be to deprive the vendee of the rights which he would otherwise have. *Peterson v. Schmidt*, 13 C. C., 205; *Snyder v. Burton*, *supra*; *Southworth v. Davison*, 106 Minn., 119; *Acker, Merrall & Condit Co. v. McGaw*, *supra*; *Von Bremen v. MacMonnies*, *supra*; *Myers v. Buggy Co.*, 54 Mich., 215.

Accordingly it is our opinion that when Berman transferred to the plaintiff corporation the business theretofore conducted in the name of the Crown Overall Company, he divested himself of all rights in the good-will and conferred those rights upon the corporation, by which they may now be enforced. Levy manifestly knew that the corporation was to be formed by Berman, because the deferred payments to be made to him by Berman were to be secured by a pledge of the stock of such corporation. Conversely, when Levy organized the defendant corporation, he could transfer to it only those rights which he himself then had; and as he had already divested himself of the

right to solicit former customers, it would be a mere mockery of justice to authorize the corporation in which he holds the controlling interest to do that which he himself may not do.

We are next to determine to what extent the injunction may affect the employees of the defendant corporation who are named as defendant. So far as Hoemmelle is concerned, his actions are beyond question unconscionable, and we shall not waste time in citing cases which uphold the power of a court of equity to prevent the disclosure or use of trade secrets. He gained his information while in the employ of plaintiff company. He has pirated plaintiff's patterns, and he must be enjoined from making use of knowledge gained in that manner. There has thus far been no testimony which indicates that Margaret Walker or Isador Schiffrin have divulged any trade secrets or done any other acts which, so far as they may be the subject of injunction, will not be amply covered by the general decree which may be entered in the case.

The testimony indicates that when Levy severed his connection with the old concern, the employees presented him with some sort of testimonial. For the alleged purpose of expressing his gratitude in letters to be sent to each of them, he obtained a list of employees. No such individual letters were, however, sent. Levy admits that he made an offer to pay a larger salary to any of the employees of the old firm who would leave it and come to him. The connection between this offer and the list of names thus obtained is quite apparent. While we do not desire to place ourselves in the attitude of preventing working people from bettering their economic condition by seeking the most profitable market in which to sell their labor, yet Levy's action in this regard is likewise an interference with the business of plaintiff with which he had impliedly agreed not to interfere. The seller of the good-will of a business has no right to endeavor to induce employees of the old concern to leave its employ and join him in a competing business.

Defendant finally contends that as no list of plaintiff's customers has been furnished, it can not be enjoined from soliciting plaintiff's trade provided no effort is made to concentrate upon those customers. The testimony indicates that defendant Levy

was, during the ten years of his connection with the old concern, engaged in looking after all credits, collections, orders, tracers and freight, and that he had access to all lists of customers, and that he met those who personally called at its place of business. It would be strange then if he did not know who plaintiff's customers were. Moreover, David Levy, one of the defendants, had been in charge of the shipping and stock rooms of the old firm. According to the testimony, he had boasted of his ability to get all the customers from the old firm by sending letters to them and he never took the stand to deny this allegation. Indeed, Levy himself is said to have remarked that he could obtain a list of the old customers by going through Dun's Agency book and checking them off, and he made no denial of this statement. Under such circumstances we are of opinion that defendant should continue to deal with plaintiff's customers at its own peril, that it is bound to know who those customers are and to refrain from soliciting their trade. Defendant's counsel has suggested that such an order will ruin the business of defendant; but if its business is founded upon an immoral basis, or conducted in an unconscionable way, it is more just for us to disregard the results which such an order may cause to defendant's business than to disregard plaintiff's rights and permit their continued infringement by defendant.

We are therefore of opinion that defendant company should be enjoined from soliciting the patronage of former customers of the firm of Berman & Levy, from continuing to deal with the former customers whose business has been secured by such solicitation, from using printed matter in manifest imitation of that now or formerly employed by plaintiff company, from copying plaintiff's patterns and from otherwise interfering with the rights which were transferred to Berman by the sale to him of the interest of Samuel Levy in the property and goodwill of Berman & Levy. While it is true that this case has thus far been heard only upon a motion for a temporary restraining order, yet it is our intention that this opinion shall cover as upon a final hearing the points already mentioned. There may, of course, be such further hearing as may be necessary to present any other questions raised by the pleadings.

1915.]

Gaisser v. Hansen.

**CORPORATE STOCK WHICH PROVED WORTHLESS GIVEN
IN EXCHANGE FOR PROPERTY.**

Common Pleas Court of Hamilton County.

LIZZIE GAISSER V. JOHN HANSEN ET AL.

Decided, 1914.

Action for Rescission of Contract—Representations as to the Value of Corporate Stock Not a Warranty, But Mere Opinion, When—Such Representations Not False Though Stock was Worthless, When—Impossibility of Making Defendant Good.

1. In an exchange of corporate stock for real estate, the representation by the owner of the stock that "it was good," or was "as good as gold," does not constitute a warranty of the value of the stock, but is a mere expression of opinion.
2. The failure of a bank three weeks after such a representation has been made by a holder of its stock, does not make the representation false in law, where it appears that the bank had declared a dividend just before the representation was made, and its stock was being quoted at \$210 in the market, and the insolvent condition of the bank was known only to its officers.
3. But even were the representation false, it could not be made the basis for the rescission of a completely executed contract; and this is especially true where it would be impossible to make the defendant whole by returning to him stock which is at this time worthless but which at the time the exchange was made was worth more than \$200 per share in the market.

Herrlinger & Dixon, for plaintiff.

Frank H. Kunkel, contra.

GEOGHEGAN, J.

This is an action by the plaintiff to set aside the conveyance by her to the defendant, John Hansen, of a certain piece of property on Main street, ninety-five feet north of Court street, in the city of Cincinnati.

The facts are, that the plaintiff, on and prior to the 27th day of March, 1912, was the owner of the aforesaid property; that John Hansen, the defendant, was the tenant of the prop-

Gaisser v. Hansen.

[Vol. 16 (N.S.)]

erty and had been the tenant of the property prior to the time that that the plaintiff inherited said property from her father; that sometime early in the year 1912 the plaintiff received an offer for said property from a firm of real estate brokers in the city, whereby they offered to lease said property from her at a rental of \$60 a month, with a privilege of purchase at \$10,000. The plaintiff communicated this fact to her brother, one E. William Oesper, who at that time and for a long time prior thereto maintained an office for the transaction of his real estate business in the rear part of the store that constituted the first floor of the building upon the premises then owned by the plaintiff. He communicated this fact to Hansen, and thereupon Hansen, having been a tenant for a number of years, desired to purchase the property, and after some conversations Hansen made an offer to purchase the property for \$11,000, and the following contract was entered into by and between him and the plaintiff on or about the 20th day of March, 1912:

"I the undersigned authorize E. Wm. Oesper to sell my house and lot No. 1015 Main St., Cincinnati, Ohio, for the sum of eleven thousand (\$11,000) dollars on the following terms, to-wit, to take the following stock in part payment:

16			
17	Shares 2nd National Stock to the value of \$3995.00	3760.00	
16			
17	Shares U. S. Printing to value	1547.00	1456.00
	Cash	958.00	1184.00
		\$6400.00	
	Mortgage	4700.00	
		\$11000.00	

"The balance the purchaser to give mortgage on this property
10

to run 5 years at 6 per cent. interest, the purchaser to have the privilege of paying \$500.00 at any time. I will pay the taxes due in June, 1912, to the amount of \$72.90 all other taxes & assessments to be paid by the purchaser.

"(Signed) LIZZIE GAISSER.

"I accept the above proposition.

"(Signed) JOHN HANSEN."

1915.]

Galsser v. Hansen.

While there is some difference between the parties as to the exact date on which this contract was signed, I am convinced that it was signed some time prior to the date of the consummation of the transaction, to-wit, March 27, 1912, and was probably signed upon March 20th or thereabout, as testified to by the defendant and the said E. William Oesper. I may state in passing that at the time the contract was signed the words and figures in the contract were as they appear in italics, but that said Hansen had made a mistake with reference to the number of shares of the Second National Bank stock that he held, as well as the number of shares of the United States Printing Company stock, thus necessitating the alteration in the contract, which, however, raises no point of controversy in this case.

This contract was, on March 27, 1912, carried out in its entirety. A deed was executed by plaintiff to the defendant, Hansen, and the defendant, Hansen, executed to her his note and mortgage, in accordance with the terms of the contract; he gave her his check for the amount of cash and transferred to her the various shares of stock, the transfer of the stock being made in the offices of the Second National Bank of Cincinnati, Ohio, which seems to have been not only the transfer agent of its own stock but also that of the United States Printing Company. The plaintiff at this time rented a safety deposit box in the said Second National Bank and placed the shares of stock so transferred to her in the said safety deposit box.

It will be observed that the sixteen shares of stock of the Second National Bank were turned over at the valuation of \$235 per share.

After this the parties went their several ways, the deed and the mortgage being duly placed upon record.

On the 15th day of April, 1912, the affairs of the Second National Bank being in an involved condition the said bank was taken in charge by the Clearing House Association of Cincinnati. By what authority this was done is not apparent from anything in the evidence, but, by inference at least, it appears that the Clearing House Association has the authority to take charge of any of its member banks which become in an involved condition. The Clearing House Association, by and through its agents, upon examination of the affairs of the bank, charged

off a considerable portion of the assets of the bank, and after managing the bank until April 30, 1912, the Clearing House Association was compelled to turn the bank over to the representative of the Comptroller of the Currency of the United States, who took charge of the bank, charged off all the rest of its capital and surplus and levied an assessment of \$100 per share upon all of the stockholders of the bank in order that the bank might continue business.

It appears from the evidence that these actions, both of the Clearing House Association as well as the comptroller of the currency, were caused by the fact that the bank had made bad loans, and that the paper of borrowers then held by the bank as assets was, in the opinion both of the Clearing House Association and the Comptroller of the Currency, of no value, and that the debts of the bank to depositors and other persons was at least equal to, if not in excess of, its capital stock and surplus. The effect of this was to leave the stock of the bank, on April 30, 1912, worth practically nothing.

This brings us down then to the complaint of the plaintiff herein.

She complains that she was induced to take this stock by fraud and that Hansen and her brother, E. W. Oesper, conspired to get her to take this stock in lieu of cash.

There is no evidence to justify this allegation and a complete and careful analysis of the evidence will show that all things were conducted openly and above board and in this aspect of the case plaintiff has failed in her proof and can not recover.

However, plaintiff further claims in her petition that the defendant, Hansen, guaranteed the stock of the Second National Bank. She says that at the time she agreed to take the stock and also at the time of the transaction, the defendant Hansen said to her that the stock was good and that it was as good as gold. She claims that by reason of the fact that at the time these representations were made the assets of the bank were such as to not make the stock worth the price that she took it at in the deal, but practically worthless, that these representations were false and that she has a right to have the contract rescinded and have an order of this court setting aside her conveyance of the property upon the payment by her of the cash which she received in the transac-

1915.]

Gaisser v. Hansen.

tion, the return of the various certificates of stock, and the cancellation of the note and mortgage. She makes no claim that the mortgage does not constitute a valid lien upon the property transferred by her, nor that the stock of the United States Printing Company is not worth the sum at which she took it over, and she admits that she received the cash upon the check of Hansen that was handed to her at the time of the transfer of the property. She relies solely, as her ground to have a complete rescission of this contract for the sale of the real estate, upon the alleged false statements of Hansen that the stock was good and that it was as good as gold.

1. This brings us therefore to consider the effect of the language alleged to have been used by Hansen, to-wit: that the stock of the Second National Bank was good or as good as gold. Do these words constitute a warranty, or, are they a mere expression or the opinion of Hansen? I am inclined to the latter view.

Ordinarily a statement by the vendor of goods with reference to their value or that they are good does not constitute a warranty of the goods. Now here in this case the parties were dealing with the stock of a national bank in the city of Cincinnati. This bank was a well known bank and, as the evidence showed, its stocks were frequently the subject of sales upon the local stock market. The means of knowing the value of the stock and the condition of the bank were equally within the power of both plaintiff and defendant.

A court, in order to determine whether spoken words at the time of entering into a contract of sale constitute warranties or create rights of action, must look to all the circumstances of the case and from that determine whether or not the language constitutes a warranty or representation, or whether it is a mere expression of the opinion of the seller. *Williston on Sales*, Sections 194, 203, 628; *Deming v. Darling*, 148 Mass., 504; *Brady v. Cole*, 164 Ill., 116; *Kennedy v. Richardson*, 70 Ind., 524; *Lucas v. Crippen*, 76 Iowa, 507; *Lockwood v. Fitts*, 90 Ala., 150.

Now, examining all the circumstances of this case and taking into consideration the means of knowledge both of the plaintiff and of the defendant Hansen, it would seem that the words so used constituted mere expressions of opinion upon which no right

of action can be predicated even though it may afterwards appear that the expressions so used were false in fact.

2. But even assuming that the words alleged to have been spoken by Hansen with reference to this stock constituted a warranty or representation, we are met at that point by the further question: Were they false as a matter of fact?

The evidence shows that at the time the stock was purchased this stock had a market value of \$210 to \$215 per share, and in the month of March, 1912, had been sold on the Cincinnati Stock Exchange at that price. The testimony in this case also shows that the defendant Hansen transferred the stock at \$235 a share. because that was what he paid for it and that the plaintiff made no objection to taking it over at that valuation. At that time no one knew, except perhaps the officials of the Second National Bank, of the condition of the paper which said bank was holding. In fact, at that time, if the officers of the bank were asked as to the value of the stock of the bank they would undoubtedly have said that the stock was of the value of \$210 per share or more. The bank had just prior to that time declared a quarterly dividend of three per cent. upon all its stock, and had published its annual statement in the daily press, which showed that its stock had a book-value of \$210 or more. Now the depreciation in the value of this stock was caused by the arbitrary, though undoubtedly lawful, action of the clearing house association under its rules and the subsequent action of the comptroller of the currency under the authority vested in him by the banking laws of the United States Government. Both the clearing house association and the comptroller of the currency declared that the paper held by the bank could not be carried as assets, and therefore refused to allow the bank to offset this paper, deemed by them to be valueless, against its debts, with the consequent result that all the capital and surplus of the bank were charged off.

Now a court of equity, when asked to rescind a contract on the ground of fraud, must look at all the circumstances of the case and must be guided by the rules of equity as well as the rules of common sense. If I were to give the effect to the language of defendant that plaintiff's counsel desires me to, I would

1915.]

Galsser v. Hansen.

have to say that the alleged representations of Hansen that the stock was good and as good as gold meant that he guaranteed that the Second National Bank of the city of Cincinnati has not made loans to persons who would be unable to pay the same, and that if it turned out that it had made such loans, as it did so turn out, at least in so far as the Clearing House and Comptroller of the Currency is concerned, then his representations must be considered as false and a rescission of the contract granted. The absurdity of such a proposition is apparent. I would hesitate to say, as a matter of law, that any man who says that the stock of a national bank is good guarantees that some lawful authority which has control of the affairs of national banks will not step in and arbitrarily, though it may be lawfully, declare that loans carried by the bank must not be carried as such, but that the surplus and capital stock must be charged off to equalize this forced depreciation of the loans. As a matter of fact and in order to show that this would be unjustifiable, the evidence now shows that more than \$300,000 of said paper declared to have been of no value has been collected and other paper is in the process of collection and will be collected, if not for the full value, at least in part thereof.

3. But even assuming that this representation is false, does it give ground for a rescission of the contract?

Counsel claiming this right has not cited to me a single instance wherein a rescission of the contract was granted in equity because of a false representation made as to a part of the consideration for the contract where the contract has been completely executed.

Mr. Dart, in his *Law of Vendors and Purchasers*, Seventh Edition, Vol. 2, page 808, says:

“Rescission for innocent misrepresentation will not be exercised for executed contracts. In other words, misrepresentation is no ground for setting aside an executed contract, unless such misrepresentation would be not only sufficient to afford ground in equity for rescission of an executory contract, but also is deceitful in contemplation of a court of law, or, as Lord Selborne stated it ‘unless there is fraud or misrepresentation amounting to a fraud.’”

And in Pomeroy's Equity Jurisprudence, 3d Ed., Section 884:

"It is now a settled doctrine of law, that there can be no fraudulent misrepresentation or concealment, without some moral delinquency; that there is no actual legal fraud which is not also a moral fraud."

And in *Parmlee, Admr., v. Adolph*, 28 Ohio State, 10, the rule is laid down as follows:

"To constitute representations fraudulent so as to be a ground for the rescission of a contract, they must be both false and fraudulent. If they are made with an honest belief, at the time, of their truth, they are not fraudulent; but if made recklessly, and without any knowledge or information on the subject calculated to induce such belief, and they are untrue, then they are fraudulent."

This same principle is involved in and supported by *Taylor v. Leith*, 26 Ohio State, 428. And in *Allen v. Hass*, 7 C.C.(N.S.), 579, the distinction between the right to rescind on the ground of fraud and the right to recover damages for a mere false warranty is clearly pointed out by the court speaking through Judge Donahue.

I have examined a great many decisions upon this subject that have been furnished me through the industry of counsel for both sides, but nowhere do I find a decision that would justify me in setting aside this conveyance on the ground of fraud.

The case of *Mulvey v. King*, 39 Ohio State, 491, relied upon to a great extent by counsel for plaintiff, was a case wherein the Supreme Court allowed, in an action upon notes given in lieu of purchase money of lands, the defense that the seller of the land had made a misrepresentation as to its extent and that by reason of such misrepresentation the purchaser, who was the defendant in the action, was, by a paramount title, ejected from the possession of a certain portion of the land. This case it will be observed was not a case of rescission and the *ratio decidendi* is expressed in the opinion of the court at page 495:

"The facts thus proved bring the case within the principles above stated and give a right of recoupment in an action for the balance of the purchase money, to the extent of the deficiency

1915.]

Galsser v. Hansen.

in the value of the property purchased. The rights of the purchaser do not rest upon the ground of fraud, actual or constructive, but that, to the extent of the difference in value between the property as it was represented to be, and the property conveyed, there is no consideration for his promise. He can not, upon any principle of law or equity, be compelled to pay for what the vendor did not own, and could not convey. The maxim *caveat emptor* does not apply to such representations as were made in this case, upon which the purchaser under the circumstances had a right to rely, and in reference to which he was guilty of no negligence."

It will be observed that the case at bar is entirely dissimilar in its facts to the case of *Mulvey v. King*.

While there is some authority for the proposition that a misrepresentation, however innocently made, will give rise to a right of action for rescission of the contract, I have not found a single case wherein, under circumstances similar to those in the case at bar, the court granted a rescission, but I have found numerous cases to the contrary.

4. Counsel claims that by returning the certificates of stock and the cash paid to plaintiff, as well as the cancellation of the note and mortgage, the defendant will be made whole.

I assume that in making this statement he recognizes the maxim that "he who seeks equity must do equity." His statement, however, merely begs the question. He does not show that he can make the defendant whole, but on the contrary shows that at the present time he can not put him in the position he was in on March 20th or thereabout, when this contract was made, or even March 27th, when the contract was consummated. Three weeks elapsed between that time and the first intimations that the Second National Bank was in trouble. Now it is self-evident that as soon as the defendant Hansen contracted to deliver this stock he could no longer make any other contract with reference to the stock. He was thus prevented from selling it in the open market, at which time he could have secured for each share a sum considerably over \$200, if the evidence in that respect is to be believed. Now who can say but that in the three weeks or a month that elapsed between the consummation of the

transaction herein involved and the time when it became known that the Second National Bank stock had depreciated to nothing in value, by reason of the actions of the clearing house association and the treasury officials, he would not have been able to effect a sale of this stock at such a price as the market at that time would have evidently afforded him. If the Second National Bank had not become involved in this trouble we would never have heard of this case. Therefore it seems to me that it would be difficult to make him whole by returning to him stock that had become worthless by reason of circumstances over which he had no control and of which he had no knowledge.

On the whole case I think that the application of plaintiff for a rescission of this contract should be denied. I have not commented upon all the authorities that were presented to me. It is not because I have not read them, but because this opinion has reached such a length that it would be more than cumbersome to touch upon them all at this time.

The briefs of counsel show the marks of much industry on their part and have been of great help to me. The case presents that always unfortunate situation of litigation between two absolutely innocent parties, one of whom has become a loser by reason of extraneous circumstances over which neither has control and for which the law gives no relief.

The petition of plaintiff will be dismissed and judgment for defendants for their costs herein will be entered.

•

1915.]

Railway v. Cincinnati.

APPROPRIATION OF PARK PROPERTY FOR RAILWAY PURPOSES.

Court of Insolvency of Hamilton County.

**THE CINCINNATI, LEBANON & NORTHERN RAILWAY
COMPANY V. CITY OF CINCINNATI.**

Decided, December 24, 1914.

Eminent Domain—Strip Taken by Railway Company Across Land Acquired by the Municipality for Park Purposes—Damages to the Residue.

1. A strip of land leased by a municipality to a railway company for a term of years for occupation by its tracks, does not thereby become a parcel carved out of an entire tract, but remains a part of the original tract subject to the incumbrance of the lease, and upon appropriation of the strip by the railway company, subsequent to the expiration of the lease, the city may recover damages to the residue.
2. Damages to the residue may be recovered either in an action to compel an appropriation under the statute or one brought to appropriate.

Maxwell & Ramsey, for plaintiff.*Walter M. Schoenle*, City Solicitor, and *Constant Southworth*, Assistant City Solicitor, contra.

WARNER, J.

The plaintiff is seeking in this case to appropriate certain property of the defendant for a right-of-way.

The case is now presented on questions arising as to Parcel B. described in the petition, consisting of a strip of land fifty feet wide running from Elsinore avenue to Desmoines street through property of the defendant. The question as to the amount of compensation to be paid for the said strip itself was submitted by the parties to arbitrators, whose findings have been duly approved. It was further agreed by the parties:

“That if on the filing of the report of the appraisers the court on application by the city solicitor is of the opinion that

the city is entitled to any sum in addition to the market value of the property taken, the determination of the amount shall be left with the appraisers under instructions of the court as in the case of a trial by jury, subject to the same review as in the case of trial by jury."

The case has now been submitted upon the application of the city solicitor for an additional sum as damages to the residue alleging "that the city property sought to be appropriated by the railroad company will dismember the said tract and permanently separate and prevent the convenient use of said tract as an entirety, thereby greatly diminishing its value."

The plaintiff company claims that the property taken is not part of an entire tract, and does not dismember any such tract, but is a separate and distinct tract of land carved out of an entire tract by an ordinance and lease for thirty years of the defendant made on March 20th, 1876, for railroad purposes. The question therefore turns upon the single issue as to whether, as a matter of law upon the material facts that appeared to be undisputed the property taken is, or is not, a part of an entire tract.

It appears that on March 20th, 1876, the city made a lease to the Miami Valley Narrow Gauge Railway Company for a period of thirty years of the strip in question for railroad purposes at a stipulated rental, and upon certain conditions not material to the decision of the question now before the court. Possession was taken of said strip, and the railroad track constructed thereon. A large part of the property through which this strip ran was at that time an unsightly gulch, used as a city dump, and a trestle work was built across the gulch for the railroad tracks, and afterwards, as required by said lease, the said gulch was filled in to the width of said strip by the railroad company.

On May 6th, 1866, the board of public works passed a resolution as follows:

"Resolved, That all that part of Eden Park property lying north and west of Gilbert avenue is no longer needed for park or municipal purposes, and the engineer is hereby requested to

1915.]

Railway v. Cincinnati.

prepare plat and make subdivision of said property as may be described by the trustees of the sinking fund."

This action of the board of public works related to property on both sides of said fifty foot strip and abutting thereon.

On March 14th, 1899, the board of public affairs passed a resolution as follows:

"*Be it Resolved*, That this board hereby declares that the lots remaining unsold in Eden Park subdivision lying west of Gilbert avenue are necessary for park purposes and are hereby reserved and that the trustees of the sinking fund be notified of this action and requested not to sell or lease any of said property."

It further appears that the city owns all the land lying between Elsinore avenue and Desmoines street and Gilbert avenue and Reading road, except certain lots, occupied by the Baldwin Piano Company and others on the southwest corner of Gilbert avenue and Desmoines street; that the property west of said strip is ten feet or more below the grade of the railroad tracks and is used for an athletic field, while the tract on the east side of said strip is on a grade with it and is devoted to ordinary park purposes.

On February 23d, 1906, not quite a month before the expiration of said lease, the petition in this case was filed. After the expiration of said lease the plaintiff company continued to hold and use said strip for railroad purposes. This strip was included in the original conveyance to the city of an entire tract known as the Garden of Eden, a part of which extended west of what is now Gilbert avenue.

Upon these facts has said strip been carved out of the entire tract so as to become a separate and distinct parcel? I think not. The lease was not a permanent grant, but a permission to use the strip for thirty years. It was simply an incumbrance upon that part of the tract owned by the city. At all times, before, during and after said lease the city was the owner of an entire tract west of Gilbert avenue, which included said strip. In *Fries v. Railroad Company*, 56 Ohio State, 135, at

page 144 the Supreme Court holds that where a railroad company enters upon land and constructs its track with the consent of the owner, but without securing a permanent right-of-way, such owner has the right to proceed to compel an appropriation as provided by Section 6448, Revised Statutes, now Section 11084, General Code, and in such proceeding "the inquiry may include as well damages to remaining land as compensation for lands taken."

As to the measure of damages it would seem to be immaterial whether the action was one to compel appropriation under the statute or one brought to appropriate.

I think, therefore, as a matter of law on the facts of this case that the defendant city is entitled to such damages to the residue of its tract as in the judgment of said appraisers seems just by reason of the taking of said strip as well as the use to which it is put. Ordered accordingly.

ACTION FOR RECOVERY ON AN UNCOMPLETED CONTRACT.

Superior Court of Cincinnati.

THE H. & S. POGUE COMPANY V. EMMA A. TOWNSLEY.

Decided, October 13, 1914.

Pleading—In an Action on a Contract But Partly Performed—Effect of Tender of Amount Admittedly Due.

Where a plaintiff in an action for recovery on a contract alleges partial performance with an excuse for failure to completely perform, a motion lies to make definite and certain an answer which admits performance of a portion of the work and states the value thereof, but omits a statement of the portions of the work left unperformed which is the fact directly in issue.

Pogue, Hoffheimer & Pogue, for the motion.

B. T. Archer, contra.

1915.]

Pogue v. Townsley.

MERRELL, J.

The petition sets forth two causes of action, the second of which relates to the labor of workmen supplied by the plaintiff for the decorating of the interior of the defendant's residence. The motion is directed to the answer to the first cause of action. This is founded upon a written agreement for interior decorating, specifying certain rooms in the defendant's residence and particular work to be done in each. The written contract is set out in the pleading. The plaintiff alleges that it performed all of the work contracted for with the exception of certain specific portions which it enumerates as to which it is alleged the completion was prevented by the defendant, and that the cost of completion is \$100. In short, the plaintiff alleges partial performance of a contract with an excuse for failure completely to perform.

The answer alleges that the plaintiff performed certain portions of the contract work, specifically defining what was done, and goes on to say that the reasonable value of the work done by the plaintiff is a certain sum and that the defendant has been damaged by the plaintiff's failure completely to perform in a sum of money which is found by subtracting the reasonable value of work done from the contract price. The motion is to require the defendant to make her answer definite and certain by stating in what respects plaintiff did not complete the work contracted for.

The action is founded upon a written contract, the making of which and the partial execution of the work provided for is admitted, and the theory of *quantum meruit* does not enter into the case. Hence the reasonable value of the work performed by the plaintiff can not be an issue in the case nor even an ultimate fact to be found by the jury. It is suggested by the defendant that the determination of what work was actually done by the plaintiff when compared with the work specified in the written contract leaves it as certain as possible what parts of the work were not performed, and that therefore the answer as drawn is sufficiently certain. Whether this suggestion is valid as a method of proof when the case comes on to be tried need

not now be determined. As applied to a statement in the pleadings it is not valid. The pleadings should state only ultimate facts and not evidential matter, and should moreover be such as to direct the jury as simply as possible to the real issues. The scope of the present pleadings is such that the jury's determination will be as to what elements of the contract work were left unperformed and the market value or reasonable cost of completing such unperformed portion. The answer as framed details the portions of the work admittedly performed and the reasonable value thereof, with neither of which will the jury be directly concerned at the trial of the case. The answer omits to state the portions of the work left unperformed, a fact directly in issue.

The contention that the jury can subtract from the performance specified in the contract the elements of part performance stated in the pleadings and thereby ascertain the elements of alleged non-performance can not be approved. It is for the pleader to make his allegations direct and certain and leave as little as possible for construction either by the court or the jury.

The authorities are in accord with the views above expressed, as for example, *Keilly v. White*, 234 Pa. St., 115.

The fact that the defendant pleads a tender to the plaintiff of the sum admittedly due under the contract does not justify a pleading otherwise open to criticism.

The motion to make definite and certain is granted.

1915.]

Butler v. Karb et al.

**OPERATION OF A MUNICIPAL LIGHTING PLANT
AT A LOSS.**

Common Pleas Court of Franklin County.

JAMES M. BUTLER V. GEORGE J. KARB, MAYOR, ET AL.

Decided, 1914.

Municipal Electric Lighting Plants—Allegations which Do Not Warrant Injunction Against Operation of—Jurisdiction Over Such an Action—Capacity of a Tax-Payer to Maintain—Furnishing Current at Less than Cost—Not a Misapplication of Public Funds Nor an Abuse of Corporate Power—City Not Required by Statute to Light All or Any of Its Streets and Alleys—Varying Rate to Consumers May Not be Discriminatory—Wisdom of Such an Enterprise Not a Matter for Judicial Investigation—Sections 3618 and 3939-12, G. C.

1. The legal capacity of a tax-payer to maintain an action to enjoin the municipality from maintaining and operating a municipally owned electric light plant at a loss is sufficiently shown by averments as to the official position of the city solicitor and his refusal to bring the action upon request.
2. It is well settled in Ohio that the court of common pleas has jurisdiction over the subject-matter of an action of this character, and having jurisdiction over the subject-matter it also has jurisdiction over the subject under such limitations as are imposed by statute or the principles of the common law upon the extent of the exercise of such jurisdiction.
3. But facts necessary to constitute a cause of action in favor of a tax-payer against administrative officers of a municipality are not shown by an allegation that the prices charged by the municipality for electric current sold to private consumers are substantially less than the cost of generating and distributing said current together with interest on the investment; or that the prices charged to private consumers are not uniform in the sense that they are not unvarying; or that, as a consequence of furnishing current to private consumers, the plant is overloaded and there is not sufficient current to light all the streets and alleys of the city; or that by reason of such overloading the plant is deteriorating, involving further loss to the municipality which must be borne by the tax-payer.

James M. Butler and Max Goldsmith, for plaintiff.

Henry L. Scarlett, City Solicitor, and Wilbur E. Benoy, Assistant City Solicitor, contra.

BIGGER, J.

The plaintiff in his petition states that he is a citizen, resident and tax-payer of the city of Columbus, Ohio; that the defendant, George J. Karb, is the mayor of the city; the defendant, Samuel A. Kinnear, the director of public service, and the defendant, Byron L. Barger, the director of public safety, and that the said three officials constitute the duly qualified and acting board of control of the said city; that the defendant, Harry Eichorn, is the superintendent of the municipal electric lighting plant of the city and the defendant, E. Clayton Cain, is the auditor of said city. He says that he has duly requested Stewart R. Bolin, the duly elected, qualified and acting city solicitor of the city to bring this action, but that the said solicitor has refused to comply with the request and that this action is brought by the plaintiff on behalf of the city.

The plaintiff states that the city has constructed and is now maintaining and operating a municipal electric light plant for the purpose of furnishing electric current to illuminate the city, to furnish power to said city and to sell the current to private consumers and individuals, that the city has expended large sums of money to build, establish and enlarge said plant; that the city is selling current for light and power purposes to private consumers in the city: that there are many streets, avenues, alleys and public places in the city which are not now lighted for which the citizens are demanding current and which for public safety and enjoyment should be lighted; that they are not lighted for the reason that the present plant has not the capacity to extend said system and to furnish current for more lights for the reasons hereinafter stated; that there are numerous private consumers from said plant: that the prices charged by the city for said current so sold to private consumers are very substantially less than the cost of generating said current, distributing the same and paying the interest on the bonds previously issued and the money used for the purpose of building, equipping and enlarging said plant: that the prices charged to private consumers are not uniform: that much of the current sold to private consumers is for use in the day time, but that during many

1915.]

Butler v. Karb et al.

months in the year beginning in September and ending in April the street lights are turned on often earlier than four-thirty o'clock P. M.; that substantially all the private consumers use the current until five-thirty o'clock P. M. and frequently later until several and many hours into the night; that a few of the private consumers are operators of moving picture shows and use much of said current at night and for many hours during the night; that by reason of these facts this plaintiff and all other tax-payers of the city are directly paying a part of the cost of said current used by private consumers; that therefore the public funds of the city are misappropriated and will continue to be so unless the court interferes to prevent it; that by reason of the over-lapping of the time when the current is used by private consumers and the time when it is used to light the streets, avenues, alleys and public places in the city, and because the plant is unable to carry a larger load during said hours, the city is unable and is refusing to light many of its streets, avenues, alleys and public places where light is necessary and proper; that the sale of the current to private consumers at the prices now charged is an abuse by the city officials of the power vested in them and of the corporate powers and authority of the city; that private consumers are thus acquiring and taking the property of the city, to-wit, current, without paying a fair and just price therefor and without paying the substantial cost thereof and without any profit thereon; that by reason of these facts the tax-payers are required to pay a higher rate of taxation and substantially more taxes and that the requirements of the citizens are neglected and denied for the private benefit of a comparatively small number of persons, to-wit, the private users of said current. It is further stated that by reason of said current being furnished to private consumers the machinery and equipment is greatly overloaded and burdened far beyond the factor of safety, thus imperiling the whole lighting system of the city; that by reason of the alleged wrongful acts aforesaid the equipment of the plant is rapidly deteriorating and depreciating and greatly in excess of the standard and necessities of a properly loaded plant; that these rates and prices have been followed by

the city and its officers for more than two years, and that unless restrained this course of conduct will be continued by entering into more of these contracts with private consumers. There are some further averments but they are only in the nature of conclusions of the pleader upon the above alleged wrongful acts of the said officials.

The plaintiff asks that the city and the said officials and employees may be enjoined from entering into any further contracts with any person for the use of the current generated at the said plant for private purposes, and also from entering into contract with any person for the use of said current at any rate or price therefor which will not return to the city a fair profit over and above the cost of production and of the cost of distribution, including a proper interest charge on a proper capital investment and including also a proper depreciation on said plant, and especially from entering into any contract with any person for current at a rate less or substantially less than the cost of production and distribution, including a proper interest charge on a proper capital investment and depreciation on the plant; for a mandatory injunction requiring the officials to terminate the contracts heretofore made and from entering into contract with private consumers until such time as the use of said current will not overload the plant, and from furnishing current to private consumers at any time when the street lighting is in operation, and that the city and its officers and agents may be required to extend the lighting system to those parts of the city now without light and that the light be used for public purposes before any of it shall be used for private purposes; and, further, that if any part of the current be permitted to be sold to private consumers that the defendants be enjoined from discriminating between citizens either as to price or location and for all other proper relief.

To this petition the city solicitor has interposed a demurrer on the following grounds:

First. That the plaintiff has not legal capacity to bring or maintain this action.

Second. That the court has no jurisdiction of the subject of the action.

Third. That the petition does not state facts which show a cause of action in favor of the plaintiff and against the defendants or either of them.

These grounds of demurrer will be considered in their order.

It must always appear either by proper averments in the petition or from presumptions which the law recognizes that the plaintiff is capable of bringing and maintaining the action. When an action is brought by a natural person and his name is stated in the title, no further averments are necessary to show his capacity to bring the action. If, however, the plaintiff is not a natural person, or brings the action in some representative capacity some statement is called for in addition to the designation contained in the caption. Where an action is brought under favor of a statute, the facts necessary to show the statutory capacity must be averred. By virtue of the statute of this state it is made the duty of the city solicitor to apply in the name of the corporation to a court of competent jurisdiction for an order of injunction to restrain the misapplication of the funds of the corporation, or an abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinances governing it or which was procured by fraud or corruption. The statute further provides that in case the solicitor fails upon the request of any tax-payer of the corporation to make the application provided for in the statute, such tax-payer may institute suit or proceeding for such purpose in his own name on behalf of the corporation.

Want of capacity only relates to the disability to maintain an action and does not relate to failure to state a cause of action. By statute the city solicitor is clothed with general capacity to bring an action to enjoin the city from abuse of its corporate powers or the misapplication of the corporate funds. When the solicitor is requested by a tax-payer to bring the action and he refuses to do so, the statute clothes the tax-payer with the same capacity which is conferred on the solicitor. The suit in either case is brought on behalf of the corporation. The capacity in neither case depends upon the sufficiency of the matters pleaded

to show a right to relief, any more than a failure on the part of a natural person to state facts sufficient to constitute a cause of action discloses a want of capacity on his part to bring an action. Capacity to bring an action in a representative capacity is to be determined by the averments showing the relation of the plaintiff to the person represented, natural or artificial, and not by the averments concerning the rights of and the invasion thereof of the person, natural or artificial, represented. When the solicitor makes the proper averments to show his official relation to the municipal corporation, he discloses his capacity to bring the action. He may fail to state sufficient facts to show a right to any relief, but if so he fails not because he has not capacity to bring and maintain the action, but he does not show that he has any cause of action against the city and its officers. The same is true of the tax-payer when he makes the additional averments concerning request made of the solicitor to bring the action and his refusal to do so. The plaintiff in this case after making the proper averments concerning the official position of the city solicitor, makes the proper additional averments concerning the refusal of the solicitor to bring the action upon request. The demurrer therefore upon the ground that the plaintiff has not legal capacity to bring and maintain the suit must be overruled.

The second ground of the demurrer is that the court is without jurisdiction of the subject of the action. While there may be a technical distinction between the subject-matter of an action and the subject of the action, I think the terms are usually used interchangeably, and that by subject of the action in our statute is meant the same thing as subject-matter of the action. That the court of common pleas has jurisdiction of the subject-matter in a case of this kind is too clearly settled to admit of doubt by a long line of adjudicated cases in which the court of common pleas has entertained jurisdiction of actions brought under favor of this statute. There is also a distinction not to be lost sight of between the jurisdiction of a court over a subject matter and the limitations or restrictions imposed either by statute or the principles of the common law upon the extent of

the exercise of that jurisdiction. A court may have jurisdiction of a subject-matter and at the time be limited by the rules of law in the exercise of the jurisdiction. Jurisdiction is not, however, defeated because it may be limited or restricted by law in its exercise. The demurrer upon the second ground must therefore be overruled.

The third ground of the demurrer is that the petition does not state facts which show a cause of action in favor of the plaintiff against the defendants or either of them.

In order to determine this question it is necessary to consider carefully the several grounds of complaint set out in the petition. These may be reduced to the following:

First, that the prices charged by the city for current sold to private consumers are very substantially less than the cost of generating the current and distributing the same and paying the interest on the bonds previously issued and the money used for the purpose of building, equipping and enlarging the plant.

Second, that the prices charged to private consumers are not uniform.

Third, that because of the overlapping of the time when current is used by private consumers and the time when it is needed to light the streets and public places in the city and the limited capacity of the plant, many of the streets, avenues, alleys and public places in the city, which need light and for which the citizens are demanding current, are not lighted, and that the city is unable and is refusing on that account to light the same.

Fourth, that by reason of the sale of current to private consumers the machinery and equipment is greatly overloaded and burdened beyond the factor of safety, and is rapidly deteriorating and depreciating in excess of the standard and necessities of a proper lighted plant.

Fifth, that these prices and rates have been maintained for more than two years and will be continued unless the court interferes by injunction to restrain the city and its officers from continuing this course of conduct.

These, in substance, are the complaints contained in the petition and which the plaintiff contends constitute a misapplication of the funds of the corporation and the abuse of its corporate powers.

The first complaint is that the prices charged to private consumers are very substantially less than the cost of generating the current and distributing the same and paying the interest on the bonds previously issued and the money used for the purpose of building, equipping and enlarging the plant. Taking this complaint by itself, does it disclose any misapplication of the funds of the city or abuse of the corporate powers conferred by its charter? It would appear from the complaint that the plaintiff entertains the view that the city has no right to sell current to private consumers except at a price which will at least equal the cost of generating and distributing it to the consumers and the interest charged upon the bonds issued to build, equip and extend the plant. I do not understand how this can be a correct test of measure by which to determine a proper rate of charge for current. This leads us to a consideration of the objects and purposes to be accomplished by the city in the construction and maintenance of this plant. The statutes upon the subject of the right of municipalities to erect and maintain such plants are found in Sections 3618 and 3939-12 of the General Code. Section 3618, being a section of the municipal code enumerating the general powers of municipal corporations, provides that the municipalities shall have power "to establish, maintain and operate municipal, light, power and heating plants and to furnish the municipalities and the inhabitants thereof with light, power and heat, to procure everything necessary therefor and to acquire by purchase, lease or otherwise the necessary lands for such purposes within and without the municipality."

Section 3939-12, as amended May 15th, 1911, and approved by the Governor on May 26th, 1911, and which relates to the issuance of municipal bonds for specific purposes provides that, "the city council when it deems it necessary may issue and sell bonds for erecting or purchasing gas works or works for the

1915.]

Butler v. Karb et al.

generation and transmission of electricity for the supply of gas or electricity to the corporation and the inhabitants thereof.”

In the light of these statutory provisions it would seem that there can be no doubt as to the right of the municipal corporation to manufacture and sell current for light, power or heat to private consumers from its municipal plant as well as to generate current for the lighting of the streets, alleys and public places of the cities. The statute authorizes the city to furnish electrical current both for the purpose of lighting the streets and for the use of the inhabitants of the municipality. The mode of the exercise of this power is confided to the discretion of the city officials. They are not required by the statute to light all the streets, avenues, alleys and public places of the city before furnishing current to private consumers. It is doubtful if a city is under obligation to light its street at night in the absence of statutory requirement, although there is apparently some conflict in the decisions on this subject (*Joyce on Electric Law*, Section 234). If, however, it be the duty of the city to light its streets, there is no requirement of law that it shall light all the streets, avenues, alleys and public places from the municipal plant. The city is authorized by statute to enter into contract for lighting its streets with any person firm or corporation (Section 3809, General Code). It may be more economical for the city to furnish current to light a part of its streets from the municipal plant in conjunction with furnishing power and light to private consumers and to light a portion of its streets by private contract, and that discretion can not be controlled by the court. It would seem from the provisions of the statute law that the city is empowered to erect and maintain an electric light plant for the purpose of furnishing current in its discretion for both purposes. If it assumes the exercise of this power and undertakes to furnish current to private consumers, it must do so in competition with other persons or corporations engaged in the same business, and the court has a right to take judicial notice that in this city the municipal electric light plant is confronted with competition. It could hardly have been within the contemplation of the law that when a plant

owned and operated by a municipality is thus brought into competition with other plants, that it shall be subjected to restrictions and restraints which are not imposed upon its competitors. The position of the plaintiff in reference to this question of price of current to private consumers is, that the contracts with private consumers must be at a sufficient rate to provide for generating and distributing the current and also to provide for the payment of the interest on the bonds issued to build, equip and enlarge the plant. Upon what principle can the entire interest charge on the bonded debt created for the purpose of building, equipping and enlarging the plant be charged upon the current furnished to private consumers? The interest on the bonds issued for that purpose is a fixed charge which must be met either by the earnings of the plant or by taxation. If the plant is confined in its operations wholly to the lighting of the streets and public places of the city, the entire charge must be met by taxation. If, however, current be sold to private consumers at a rate which will cover the cost of generation and distribution and some portion of the interest charge, to that extent the tax-payers are relieved of the burden. What proportion of the current generated at the municipal lighting plant is furnished to private consumers and what proportion is used in lighting the streets and public places of the city is not disclosed. If the amount furnished to private consumers is but a small part of the total current generated, and if that same portion of the current should be charged with the burden of the interest charge on the bonds issued for building, equipping and enlarging the plant, it would seem clear that the municipal plant would stand but little chance with a privately owned plant which distributes that charge ratably to the entire output of its plant. The complaint, therefore, with reference to the price charged to private consumers furnishes no ground for interference by the court or, rather, it should be said the petition does not state facts to show that there is any just ground for complaint as to the price charged.

The next complaint is that the prices charged to private consumers are not uniform. The word uniform in its ordinary

1915.]

Butler v. Karb et al.

significance means not varying, unchangeable. The charge is not made more specific. The plaintiff argues that the city officials in charge of the plant have no right to discriminate between those who apply for the use of the current and that is undoubtedly true. But what does discrimination mean? The law does not permit corporations, public or private, to discriminate unjustly as to rates. But the law does not and never did require that rates should be unvarying. The rule is that they must not discriminate in rates to different patrons so as to give one an undue advantage over another. It is, however, not an undue preference to make one patron a less rate than another where differences in conditions exist, when there is such a difference in the expense or difficulty of rendering the service as to justify the difference in rates. This rule has been applied in the case of telegraph companies and railway companies. The law forbids discrimination between patrons for the same service under like conditions. It would seem that in the case of electric light companies there are patent reasons which would justify a greater difference in rates than in the case of either railroad or telegraph companies. An electric light plant must convey its product to the consumers. That is, it is required in the transaction of its business to build its track, so to speak, to each individual consumer. This necessarily creates a condition which to some extent at least does not exist in the case of railroad and telegraph companies. In the case of a large consumer of current and whose plant may be in close proximity to the established lines of the plant, the current it would seem could be furnished at a less rate than to one whose plant is remote and who uses but a small amount of current. The petition, therefore, only averring that the prices are not uniform does not state a fact which shows any right of action in the plaintiff.

The next ground of complaint is that because of the overlapping of the time when current is used by private consumers and the time when it is needed to light the streets and public places of the city and the limited capacity of the plant, many of the streets and public places are not lighted and for which the citizens are demanding current and that the city is unable and re-

fusing for that reason to light same. As I have already pointed out, a city is not required to light all the streets and public places from the municipal plant. It may, if it sees fit to do so, light a part of its streets and public places by contract. It may never have been the intention of the city authorities to light all of its streets and public places from this plant, or it may be that the city is not financially in a condition to so extend its plant that it can at this time do so; but contending as we must for the purpose of the demurrer that the city refused because of the sale of this current to private consumers to extend at this time the system of street lights from the municipal plant, I find no law, nor has any been cited, which requires the city to discontinue its sale of current to private consumers in order to extend the street lighting from this plant. It is doubtless true that one of the purposes for which the plant was erected was to furnish light for the streets, but the city is also empowered in its discretion to furnish current to private consumers. It may be that one of the purposes or objects of the city in erecting and maintaining the plant is to furnish competition in the business of furnishing light and power to the inhabitants of the city. The court sees no reason to hold that one object may not have been as prominent as the other in leading to the erection and maintenance of the plant. In the opinion of the court this furnishes no ground for the interposition of a court of equity.

The next complaint is that by reason of the sale of current to private consumers, the machinery and equipment is greatly overloaded and burdened beyond the factor of safety and is rapidly deteriorating and depreciating in excess of the standard and necessity of a properly loaded plant. To this it may be said that it might just as truly be charged that because of the extent of the lighting of the streets the plant is overloaded and burdened beyond its capacity. But, looking beyond that, it is, I think, a doubtful question whether or not a court of equity will interfere to restrain municipal authorities who are exercising administrative functions upon the mere ground that they are not acting wisely in the judgment of the court, so long as their acts are clearly within the power granted. It is a well established prin-

1915.]

Butler v. Karb et al.

ciple of law that municipal officers in the exercise of administrative or legislative discretion, are not subject to judicial control or review in the absence of fraud or that which is equivalent thereto, and there is no charge of fraud made in the petition, and the court must, therefore, assume that the municipal officers are acting in good faith and for what they believe to be the best interests of the city. The court is not authorized to interfere with the judicial discretion reposed in the city officials unless there is fraud, manifest oppression or gross abuse. How long the plant has been thus overloaded is not stated. Such a temporary condition might prevail without furnishing any ground for interference with the discretion of the city officials. It is incumbent upon the plaintiff to state facts sufficient to show not merely that a case might be proven which would justify an injunction at the hands of the court, but facts must be stated which show that the discretion reposed in the officials has been so abused as to call for action on the part of the court. It might be that such a condition might exist temporarily while the city was making preparation to relieve it in the case of a plant such as this and which is called upon to extend and enlarge its plant as the business increases, it will sometimes find its capacity overtaxed temporarily while after it furnishes additional equipment it may have greater capacity for a time than is necessary to meet the necessities of the business. Clearly there must be some limit of discretion permitted to those in charge of the plant in a matter such as this. Under such circumstances a court of equity would not be called on to enjoin the city officials. It would certainly lead to serious consequences if the court should entertain suits upon the complaint of tax-payers who should allege that some portion of the city machinery was being operated by those charged with its management beyond its proper capacity, without any complaint that they were doing so with any fraudulent intent or purpose or that they purposed to continue for an unreasonable time to operate beyond its capacity. It would practically amount to the court's undertaking to guide and control the city officials in the details of the business committed to their care and discretion. I do not say that a case might not be made which would show such gross mismanagement that it

would be tantamount to fraud or constitute gross abuse, but it would seem that the averments of the petition on this point are not sufficient to call for the interposition of a court of equity.

Upon this subject Judge O'Brien construing the New York statute, says in the case of *Talcott v. City of Buffalo*, 125 —, at page 288:

“Any other construction would subject the discretionary action of all local officers and municipal bodies to review by the courts at the suit of the tax-payer, a result which would burden the courts with litigation without increasing the efficiency of local administration. Whatever evils may exist in the government of a city that are due to mistakes, errors in judgment or lack of intelligent appreciation of official duty must necessarily be temporary compared with the mischief and inconvenience which judicial supervision in all cases would ultimately produce. Local officers are elected or appointed for such brief periods that frequent opportunity is afforded to the public and the tax-payers interested in their official acts to change them and substitute others in their places. There is a broad field for the operation of the statute without extending it to the official action of the common council in regard to the choice of methods for lighting a city street, a construction which it seems to us would greatly impair the right of local self-government.”

The one further complaint is that the prices for current to private consumers have been maintained for two years and will continue to be maintained unless restrained by the court. If the conclusion reached that the petition does not state facts to show that the prices charged constitute any abuse of discretion on the part of the city officials is correct, of course, the continuance of the rates would furnish no grounds for interference. The conclusion, therefore, is that the petition does not state facts sufficient to show a right of action in the plaintiff, and the demurrer is sustained.

Plaintiff will be given leave to amend his petition within ten days.

1915.]

Butler v. Karb et al.

Common Pleas Court of Franklin County.

JAMES M. BUTLER, v. GEORGE J. KARB, MAYOR OF THE CITY OF
COLUMBUS, OHIO, ET AL.

Decided, December, 1914.

Administrative Functions of Municipalities—Utilities Operated by, Not Necessarily Self-Sustaining—Service Sometimes Rendered to Citizens Without Charge, and Sometimes at a Charge which is Less than Cost—Whether Light and Power Shall be Furnished for Less than Cost Not a Question for the Courts—"Furnishing" Distinguished from "Selling"—Discrimination Not a Matter of Which a Tax-Payer May Complain—Section 3618.

1. It is not a misapplication of public funds, or an abuse of corporate power, or an execution and performance of contracts in contravention of the laws governing Ohio municipalities, for a city to furnish electric current for light and power at prices which do not make the plant self-sustaining; and it is not within the province of a court to interfere with such an enterprise on the ground that the city is thereby losing money.
2. A municipality can not discriminate in the service of whatever kind which it furnishes to its citizens; but inasmuch as discrimination in rates for light and power can in no wise affect the plaintiff in his capacity as a tax-payer, the allegation in this case as to such discrimination can not be considered.

James M. Butler and Max Goldsmith, for plaintiff.

Henry L. Scarlett, City Solicitor, and Wilbur E. Benoy, Assistant City Solicitor, contra.

The matter is heard upon demurrer to the petition and amendment thereto. The pleadings present two main questions for consideration, as follows:

- I. Current is furnished private consumers at less than cost.
- II. The discrimination in private consumption.

The former question naturally divides itself for consideration into three parts, as follows:

(a) The electric lighting plant of the city of Columbus is operated in its proprietary capacity as distinguished from its governmental capacity. POND on Public Utilities, Section 5, 9;

City of Henderson v. Young, 83 S. W., (Ky.), 1904; Pikes Peak Power Co. v. Colo. Springs, 105 Fed., 1.

(b) The director of public service, upon whom is conferred the authority and power of managing that public utility, is an officer invested by legislative authority with discretion in the making of such contracts, and this discretion is not to be interfered with by the courts, unless gross abuse or fraud, or their equivalent, is shown. Section 3618, G. C.; Section 3939, Sub-division 12; Section 3994, G. C.; Section 4326, G. C.; Section 4403, G. C.; Pond on Public Utilities, Section 11; Roberts v. City of Columbus, 15 N.P.(N.S.), 297; 15 Am. & Eng. Enc. of Law, page 1046; 22 Cyc., 889; 28 Cyc., 1744; Crawfordsville v. Braden 14 L. R. A., 268 (Ind., 1891); Water Works v. San Francisco, 6 L. R. A., 756; Twitchell v. Spokane, 24 L. R. A. (N.S.), 290 (Wash., 1909); Coppin v. Herman, 7 N. P., 6 and 528; Hubbard v. Norton, 28 O. S., 133; Columbus v. Board of Public Safety, 14 O.D.N.P., 715; State v. Herman, 63 O. S., 440; State v. Board, etc., 81 O. S., 218; City of Detroit v. Hosmer, 79 Mich., 384; Richmond Safety Gate Co. v. Ashbridge, 116 Fed., 220 (1902); Seward v. Liberty, 142 Ind., 551 (1895); Wells v. Atlanta, 43 Ga., 67 (1895); Talcott v. Buffalo, 125 N. Y., 280; Dailey v. New Haven, 60 Conn., 314; Avery v. Job, 25 Oregon, 512 (1894); Conner v. City, 107 N. W., 639 (Wisc., 1906); Johnson v. Cincinnati, 11 O. D. N. P., 383 (1890); Joyce on Electric Law, Section 220; Joyce on Injunctions, Section 1277; Dillon on Municipal Corporations, Section 1489 (5th Edition).

(c) The petition and amendment do not aver facts demonstrating that the defendants have abused the discretion conferred upon them by law. The pleadings do not charge the defendants with fraud or manifest oppression, nor does it charge the defendants with gross abuse of the discretion vested in them, or charge facts tantamount to fraud. A motion was made to make the pleadings definite and certain by amendment. Section 11370, G. C.; Railroad Co. v. Kistler, 66 Ohio, 326.

A demurrer to a pleading admits the facts well pleaded therein, but it does not admit conclusions. Railway Co. v. Moore, 33 O. S., 384; Peterson v. Roach, 32 O. S., 374; Dayton v. Har-

1915.]

Butler v. Karb et al.

mon, 12 C. D., 574; nor does it admit facts contrary to the court's judicial knowledge. Phillips on Code Pleading, Section 302; Bates Pleading and Practice, pages 425, 428.

A motion to a pleading having been made and overruled, the common law rule of pleading that the pleadings should be construed most strongly against the party pleading prevails. Stewart v. Balderston, 10 Kansas, 131.

The record presents a case in harmony with the reasoning of Power Company v. Colorado Springs, 105 Federal, 1; Mayor v. Water Works Company, 202 U. S., 453, 470.

As to the second question, to-wit, discrimination in private consumption, the plaintiff is not the proper party to make complaint. 29 Am. & Eng. Enc. of Law, page 19; Gas Co. v. State, ex rel, 57 L. R. A., 761, 762.

The action is brought by a tax-payer on behalf of the city of Columbus and not on behalf of any person or class of persons against whom discrimination is shown either in the matter of rates or the matter of service.

The individual discriminated against is the proper party to make complaint. Pond on Public Utilities, Section 214; Telephone Co. v. State, 118 Ind., 194; Wagner v. City of Rock Island, 146 Ill., 139; 21 L. R. A., 519; Hatch v. Consumers Co., 40 L. R. A., (N.S.), 263; C., H. & D. R. R. Co. v. Bowling Green, 57 O. S., 336.

ROGERS, J.

The case is here on a general demurrer to the petition and amendment thereto. A demurrer was sustained to the original petition (*ante*) and by the amendment it is sought to cure the defects in the petition.

There are two main contentions made in support of the petition and amendment by plaintiff's counsel, namely: (1) that the city of Columbus, by reason of the sale of current from its electric light plant to private consumers at less than cost is operating its plant at a loss, which loss must be paid by the tax-payers; and (2) that in the sale of such current there is no uniformity or classification of prices among customers. The operation of the plant by the city officials, under these condi-

tions, it is claimed, is such a gross and manifest abuse of their discretionary powers and such a disregard of the rights of the tax-payers as amount to fraud upon them, entitling plaintiff as a tax-payer to an injunction.

The statute under favor of which the case is brought provides in substance for an injunction in case of misapplication of the funds of the corporation, or abuse of its corporate powers, or the execution or performance of a contract made in behalf of the corporation in contravention of the laws governing it, or which is procured by fraud or corruption. Hence if the facts pleaded show that the corporate funds are being misapplied or its corporate powers are being abused, or that it has executed or is performing contracts in contravention of the laws governing the corporation, or which were procured by fraud or corruption, a sufficient case is made in the petition and amendment as against a general demurrer.

The allegations relative to sales of current for less than cost are, in substance, these:

“That the prices charged by said city for said current sold to said numerous private consumers as in said petition recited are very substantially less than not only either the proportionate fair, just, reasonable, equitable or actual cost of generating said current and distributing the same but also either the proportionate, fair, just, reasonable, equitable or actual part of the interest on the bonds previously issued and the money used for the purpose of building, equipping and enlarging said plant; that under any just, fair or equitable method, system or schedule known to or used by either municipalities or private persons or recognized or permitted by law, the said prices charged by the said city for said current to said private consumers are far below any just, equitable, reasonable or actual, or any, cost of production or distribution. even considering all the circumstances under which the said plant furnishes both street and municipal and private light and current and without any regard to any profits of any kind and considering also any alleged advantage that may accrue to the said city because of its sale of current to private consumers; that said current sold as aforesaid has never at any time been sold at any profit to the said city; that on the contrary the said sale of said current has at all times entailed a clear, direct and positive loss upon said city;”

1915.]

Butler v. Karb et al.

* * * “that said current, as in the petition averred, has for a long time been sold, and still is sold, at rates and prices less than any possible cost of production and transmission, and without any regard to any profit, and less than either the proper, fair or actual cost of the same when due and proper distribution of the cost of current is made between that used for street lighting and municipal purposes and that used for private consumers.”

After a careful study of the pleadings and briefs of counsel I am unable to reach the conclusion that the foregoing allegations taken in connection with the other allegations of the pleadings make a case for injunctive relief, either on the ground of misapplication of corporate funds, or abuse of corporate powers, or the execution or performance of contracts in contravention of the laws governing the city, or through fraudulent or corrupt procurement. The right of the city to furnish electric current to private consumers is conferred by statute, wherein it grants the power to establish, maintain, and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat, and to procure everything necessary therefor (Section 3618, G. C.). And in the exercise of this power the city is exercising an administrative function. It is fundamental that in the exercise of such duty courts will not interfere unless the discretion of the officials is so grossly and manifestly abused as to amount to a fraud upon the tax-payers and a disregard of their rights.

The position of counsel for the plaintiff appears to be that the city has no right to furnish electric current to its inhabitants, so long as the city is not able to produce the current at the price at which it is being sold, taking into consideration the expense of generation, the interest on the bonds, the money invested, and the like, as well as all the other advantages to the city by selling current to its citizens. Apparently the theory of plaintiff's counsel is that whatever service the city renders to one of its private citizens it must be remunerative at least to an amount equal to the cost of the service. In other words, the service must be self-sustaining; otherwise it can not be rendered by the city to the individual.

I do not understand that this is the theory upon which the various public utilities of a municipality are operated by it, such as the water works, lighting and power plants, gas plants, garbage and refuse disposal plants, the removal of ashes and other refuse from the residences of its citizens and the like.

The statute granting the authority to cities to furnish light and power to its inhabitants does not confer power on the city to sell electric light or power to the inhabitants, but confers power to furnish such light and power. Whether such light and power may be furnished above, at or below cost or even free to the inhabitants, does not appear by the express language of the statute; hence if counsels' contention is correct, the words "to furnish" must be construed to mean to sell, and then only at or above the cost of production, etc. I am unable to give the words "to furnish" that construction. The city is given power to furnish its citizens electric light and power, and it is left with the city to fix the terms upon which such light and power may be furnished. If the city sees fit to furnish light and power to its inhabitants at less than cost, I see nothing in the statute to prohibit the city through its officials from exercising its discretion to that end. If plaintiff's contention were correct, that in the sale of electric current to the inhabitants there must be no loss to the city, and that the sale price must at least equal the entire cost of production, a municipal plant might never be able to furnish its citizens with electric light or power. Of necessity every municipal plant of this character must start with a few customers; yet as a matter of economy must make preparation in the way of lands, buildings, installation of machinery, wiring, poles and the like, for probable future increase of business and custom. On the other hand, if the power conferred by the statute upon the city to furnish electric light and power to its inhabitants is construed to mean authority to sell at such prices as the city may determine, the city in the exercise of its proprietary functions is put in a position to operate the plant as business men would engage in a like enterprise. As a matter of economy business men would probably build their plant, not alone to supply present needs, but in anticipation of probable

future demands, with the view that the future returns on the investment on account of increasing business would make up for any present losses.

The statutory authority of cities to furnish electricity, light and power to the inhabitants is found in the general enumeration of powers recited in the statutes, and these powers include the power to maintain police and fire departments; to provide for a supply of water; to establish, maintain and regulate free public band concerts, and free public libraries; to provide for the renting of free public hospitals; to provide for the collection and disposal of sewage, garbage, ashes and animal and vegetable refuse, etc. For the use and benefit of its citizens the city charges them for some of the benefits above mentioned which the city has power to furnish, and for others it makes no charge whatever, as for example, the removal of garbage, ashes, and refuse matter and the extinguishment of fires.

As it appears to me so far as the city has the power to and is furnishing a part of its inhabitants electric current who are willing to pay the price therefor, it is not within the province of the court to interfere with the prices at which the city is disposing of its electric current, merely on the ground that the city thereby is losing money. His Honor, Judge Bigger, in the former opinion on the demurrer to the petition has so completely covered the subject that it appears to me it is unnecessary for me to elaborate upon this feature of the case further.

A further contention is that the prices charged for the electric current are not uniform under the same or like condition and are discriminatory among the city's customers. I am inclined to the opinion that the pleadings show a wrong in this respect, that is in need of a remedy. That a city through its officials can not discriminate in furnishing service of any kind to its citizens but must act impartially in furnishing such service, appears to be fundamental. However, is the plaintiff a proper party to make complaint? The discrimination in rates charged and paid for the electric current in no wise appears to affect the plaintiff as a tax-payer. In other words, it is not shown that his taxes would be less if there were no discrimination in rates, or in fact would

be affected either way; nor does it appear that he has sought to have the city furnish him service at a reasonable rate; and it has been refused, although the city is furnishing like service to others on more favorable terms. In this view of the case I am of the opinion that the plaintiff does not allege sufficient facts in the respect just mentioned to entitle him to injunctive relief.

Having found against the plaintiff upon the two main points, namely, the sale of current below cost, and the discrimination among customers, the court has not gone further into the petition and amendment thereto, as these two points appear to have been the ones relied upon by plaintiff's counsel. The demurrer to the petition and amendment is accordingly sustained. Exception.

**NECESSARY ALLEGATIONS UNDER THE WORKMEN'S
COMPENSATION ACT.**

Common Pleas Court of Hamilton County.

WILLIAM H. CHAMBERLIN V. THE LUNKENHEIMER COMPANY.

Decided, April 13, 1913.

Pleading—Action for Injuries to an Employee—Reference to the Workmen's Compensation Law Subject to Motion to Strike Out—Necessary Averments.

In an action by an employee for injuries received in the course of his employment, it is only necessary that he state such facts as will bring his case within the rule of law governing an employer who has more than five men in his employ, or the rule applying to one who employs five men or less than five men; and where the workmen's compensation act is pleaded, a motion lies on the part of the defendant to strike out all reference thereto.

Robertson & Buchwalter, for motion.

Jones & Hoover, contra.

NIPPERT, J.

The defendant company, by its motion, seeks to strike out from the petition all reference relating to the so-called work-

1915.]

Chamberlin v. Lunkenheimer Co.

men's compensation act, which the plaintiff has pleaded in the sixth paragraph of his petition, as follows:

"The defendant has now, and has had employed since January 1, 1912, more than five workmen or operatives, regularly in the same business; that said defendant has not availed itself of the provisions of the employes compensation act, nor has it paid into the insurance fund the premiums provided by this act passed by the General Assembly of the state of Ohio, May 31, 1911, as contained in Volume 102 of the Ohio Laws, page 524, nor taken any steps to protect itself thereunder but has totally ignored and refused to accept the protection of said act."

There is no question in the mind of the court that the objection to this part of plaintiff's petition is well taken for two reasons: first, it anticipates a possible defense of the defendant company, depriving it thereby of its right to set up its defense in its own way; and, second, it is an attempt to lead the jury to believe that there has been a violation of the law by defendant company, when in fact there has been none at all.

The workmen's compensation act is elective pure and simple. In Section 20-1 of the act, it specifies the duties of those employers who elect to pay into the fund, while Section 21-1 sets out the limitations of liability denied to those employers who fail to take advantage of said act. This act further creates and subdivides the employers of Ohio into two distinct classes (1) those who employ five or more workmen in the same business, and (2) those who do not so employ five men. Those who employ five men or more may elect or not to accept the benefits of this act. If they do so elect to pay into the fund they are relieved of liability to respond in damages to their employees, but, if they do not so elect they are deprived of their common law defenses as set out in Section 21-1.

Thus it will be seen that there is a different set of rules to the employer of five or more men than to the employer of less than five men, and as this statute is a general act, the court will take judicial notice of same and it is not necessary to plead such statute as a part of plaintiff's right of action.

All that is necessary, therefore, to plead is for the plaintiff to state such facts as will bring his cause within one or the other

of the rules of law governing the class to which the employer belongs.

In the case at bar, the plaintiff may state in his petition that the defendant employs five or more workmen. This clearly fixes the class to which the defendant belongs and apprises the court which set of rules of law are applicable to the case.

The motion to strike out will therefore be sustained as to the sixth paragraph of the petition saving and excepting the first part of same which relates to the number of workmen employed, and plaintiff given ten days time to plead.

END OF VOLUME XVI.

INDEX.

ABUTTING OWNER—

Rights of, with reference to the placing of a line of telephone poles in front of his property and the trimming of his shade trees by said company. 191.

Easement of, in the sidewalk in front of his premises. 358.

ACQUIESCENCE—

By a public officer in the amount of compensation paid to him under a law afterward declared unconstitutional. 289.

ADMINISTRATOR—

As to the appointment of administrators for the estates of deceased subjects. 9.

An administrator is liable for costs assessed against his decedent in a criminal action prosecuted during his lifetime. 41.

A fine is not a debt within the administration act. 41.

Rights and duties of an administrator under an order to continue a business theretofore carried on by the decedent; proper expenditures under such an order; extra compensation for extraordinary services; statutory compensation allowed on funds under control of the administrator but which never actually came into his possession. 337.

Where a going concern passes into the hands of an administrator the court will rely on his ability to handle the business to the advantage of the estate and will not scrutinize his acts in the absence of any showing of bad faith or incapacity. 337.

In such a case the court will not order an examination of the books at the expense of the estate, when. 337.

It will be presumed, in the absence of a showing to the contrary, that an action brought against the estate of a decedent was properly defended, and where such an action results in a judgment against the administrator he is justified in paying other claims of like character. 337.

Proceedings to sell real estate to pay debts; erroneous entry vacating previous decree becomes binding through failure to appeal. 209.

A judgment recovered against a domiciliary administrator in Alabama can not be made the basis of a right of action by a judgment creditor against the ancillary administrator of the same estate in Ohio. 285.

AGENCY—

A party undertaking to complete the work of a defaulting contractor is not the agent of the surety. 225.

AMENDMENT—

After the jury has been sworn and either party has demanded judgment on the pleadings it is too late for the other party to ask to amend. His only remedy is a dismissal without prejudice. 93.

APPEAL—

Failure to appeal from an erroneous judgment of the probate court causes said judgment to become binding. 209.

ASSIGNMENT OF WAGES—

It is a violation of the law relating to the assignment of wages to fail to fill in the blank form provided by statute, in figures, the amount due from the assignor under the assignment. 59.

ASSUMPTION OF RISK—

Assumption of risk and contributory negligence distinguished. 33.

ATTACHMENT—

Does not lie on a claim of a merchandise broker for necessities. 443.

Does not lie on the ground the indebtedness was fraudulently contracted, where it appears that the possession of the money which is the subject of the attachment was acquired under the provisions of a contract and title thereto is claimed by the holder under the terms of said contract. 557.

BANKS AND BANKING—

A bank organized under the laws of Ohio and incorporated under the free banking act has a lien upon the shares of a stockholder for any indebtedness due from such stockholder to the bank, and the lien is superior to that of another creditor prior in time. 65.

But there can be no lien in favor of such bank upon stock issued after June 7, 1911, by virtue of Section 8673-15, unless the right of such lien be stated upon the certificate of stock. 65.

The president of a trust company will not be held guilty of wilful misapplication of its funds, with intent to defraud and injure the company by loaning said funds without proper security to a company which proved to be insolvent, where it is not shown that he made the loans or had any intention to injure or defraud the bank, but was justified by the information upon which he acted in believing the loans were good, and they were authorized by the executive committee and were approved by the board of directors after they were made. 513.

Money and funds distinguished from credits. 513.

BIDS—

Under which a municipal con-

tract is to be awarded—see MUNICIPAL CORPORATIONS.

BILL-BOARDS—

The proper test as to the validity of a bill-board ordinance, or the extent to which such an ordinance is valid, is found in the fundamental principle that private property must ever be held inviolate, except in so far as it may be subject to the police power, exercised for the health, safety and morals of the community. 1.

Provisions with reference to bill-boards which are reasonable and others which are unreasonable. 1.

Where a bill-board which has been erected within the street line is ordered removed, it is competent to insist that if a new board is erected within the lot line that it shall conform to valid provisions established by ordinance and in force at the time of the re-election. 1.

A vendor's lien can not be based on a privilege or license, such as the right of the grantor to maintain on the premises conveyed bill-boards and signs free of rental therefor. 62.

BILLS OF EXCEPTIONS—

The practice in the municipal court with reference to the filing of bills of exceptions and the giving of notice thereof should be made to apply as nearly as possible to that of the common pleas. 298.

Failure of a municipal court clerk to give notice of such filing is no ground for striking the bill from the files. 298.

BURDEN OF PROOF—

Of showing the character of organization of a mutual telephone company. 177.

CIVIL SERVICE—

Tenure of a municipal employee who has been temporarily appointed by the mayor; rule limiting such appointments to three

months is inconsistent with statutory provisions; a mandatory writ will issue to continue such an appointee on the payroll, when. 160.

COMMISSIONS—

For sale of real estate. 486.

CONSTITUTIONAL LAW—

Section 6415, G. C., as amended (103 O. L., 139), providing subdivisions of the half-bushel is a valid enactment. 257.

Section 25 of Article II, vests in the Legislature power to fix the rate to be contributed by employers to a state fund for the compensation of workmen when injured and their dependents in case of death. 279.

Section 16 of the workmen's compensation act (Sec. 1565-63, G. C.), providing the amount of money to be contributed by the state itself to the said fund through its taxing districts confers valid power upon the Legislature. 279.

The wisdom of legislative enactments is not a matter for judicial review. 279.

The question of the validity of an ordinance is not rendered *res adjudicata* by reason of the fact that a former ordinance of the same general character was held constitutional. 353.

Section 6418-1, as amended, providing that "all articles herein-after mentioned, when sold, shall be sold by avoirdupois weight or numeral count, unless by agreement in writing of the contracting parties, is an arbitrary infringement upon the liberty and property rights of citizens, including the right to contract, and is invalid. 401.

A constitutional amendment must be adopted in strict conformity with the method provided by the existing Constitution, and it is within the province of the judiciary for a court to inquire whether in the adoption of an amendment said provisions have been followed. 417.

The amendment of 1912 to Article II became operative and in full force from its adoption with respect to all of its provisions, including the provision as to how future amendments shall be submitted and adopted, and as to said provisions the said amendment was self-executing and required no further legislative enactment. 417.

The fact that a method is provided for the submission of an amendment at a general election and for a vote thereon, together with the fact that the people did vote on the amendment restricting to a certain extent further legislation having reference to the manufacture or sale of intoxicating liquors, is a sufficient warrant for a court to declare that it has become a part of the organic law of the state, notwithstanding election machinery has not been provided for canvassing, counting and reporting the vote thereon. 417.

The bar which has been raised by the Home Rule Amendment against further enactment of laws restricting traffic in intoxicating liquors is not in contravention of the republican form of government, nor does it violate the welfare clause of the Federal Constitution. 417.

Application of the doctrine of waiver and acquiescence to the case of a public officer who accepted compensation under a law which was afterward declared unconstitutional. 289.

The provisions of a bill-board ordinance must be brought within the principle that private property must ever be held to be inviolate; such an ordinance is not enforceable where founded on aesthetic ideas alone. 1.

CONTRACTS—

Of shipment; limitation of carrier's liability void, when; but void clauses do not render the entire contract void. 194.

The party undertaking to complete the work of a defaulting con-

tractor is not the agent of the surety. 225.

False representations as to the value of stock exchanged for other property can not be made the basis for rescission of a completely executed contract, especially where it would be impossible to make the defendant good by returning to him the stock which has in the meantime become worthless. 577.

Pleading in an action on an uncompleted contract. 590.

Where entered into by a municipality in connection with the celebration of a patriotic event. 468.

For purchase of real property, with a provision for surrender of possession in case of a failure to pay installments as they become due; action in forcible detainer lies. 493.

A real estate agent is not entitled to a commission for procuring a purchaser for property unless he procures an enforceable contract. 486.

The test as to an enforceable contract is whether a court of equity would decree specific performance. 486.

CONVERSION—

Not a ground for attachment. 557.

CORPORATIONS—

A director can not be trapped into attendance upon a meeting of the board of directors; and where his presence was necessary to make a quorum and his attendance is secured by misrepresentation, action taken by virtue of his being present is void. 22.

In order to render valid an act of a board of directors of a private corporation, a majority of the quorum of the board must be disinterested with respect to such act; a director who is personally interested in action taken by the board is disqualified from participating in action with reference thereto and can not be counted as part of the quorum. 22.

The eighteen months limitation, prescribed by Section 8688 for actions to enforce the liability of stockholders, has no application to a suit for judgment on an assessment against stockholders levied in an action begun prior to the enactment of said section. 481.

COSTS—

The estate of a decedent is liable for costs assessed against him in a criminal prosecution during his lifetime. 41.

COUNTY CLERK—

Has no title to fees earned in naturalization cases. 449.

COURTS—

A court will be controlled by the decision of a higher court, when. 41.

Functions of the judiciary and of the General Assembly; wisdom of legislative acts not a matter for judicial review. 279.

Proper practice in the municipal court with reference to the filing of bills of exceptions. 298.

Terms of the probate court. 209.

A change in judicial opinion as to the constitutionality of a salary law is without effect upon an officer who accepted compensation under the law as it stood and acquiesced therein. 289.

COVENANTS—

Knowledge of a sub-lessee's violation of the terms of an original lease is a necessary prerequisite to a forfeiture for unlawful occupation. 97.

CRIMINAL LAW—

Prosecution before a mayor of a village of violations of the liquor laws occurring within the county. 167.

A plea in abatement to an indictment, alleging that the grand jury did not have before it or within the knowledge of its members any evidence connecting the defendant with the crime alleged,

does not set up a defect in the record by facts extrinsic thereto, and demurrer lies to such a plea. 265.

Circumstances which warrant admission to bail, where the defendant has been tried for murder with the result of a jury disagreement. 385.

Chief officer of a bank not guilty of misapplication of the funds of the bank by making bad loans, when; money and funds distinguished from credits. 513.

CUSTOM AND USAGE—

As between a telephone company and its linemen with reference to responsibility for knowledge of the condition of telephone poles as to safety of those compelled to climb them. 129.

DAMAGES—

Distinguished from injuries; compensation not restitution. 129.

Duty of the trial judge where the evidence and charge are disregarded and damages awarded in an excessive amount for a personal injury. 129.

A wife can not recover for loss of consortium, when. 504.

DECISIONS—

When the decision of a higher court is to be regarded as a precedent. 33.

A judge hearing a case on the merits is not bound to follow a previous ruling on an interlocutory order, when to do so would perpetuate error and work an injustice. 225.

DEFENSES—

A claim that the note sued on was given for a consideration which failed (the future delivery of coal), is not a defense to an action by a bank which purchased the note before maturity without notice as to the consideration or the understanding between the parties. 273.

DISMISSAL—

Is the only remedy where it is

discovered that an amendment is necessary and the jury has been sworn and judgment on the pleadings demanded by the opposite party. 93.

DITCHES AND DRAINS—

Injunction does not lie on the petition of a lower proprietor to prevent the collecting of water from a wash into a ditch and the hastening of it in its course to the land of a lower proprietor, instead of permitting it to spread over the field from which it was gathered, provided in so doing it is not diverted from its usual drainage channel or depression but the flow is merely expedited toward the natural outlet. 379.

DIVORCE AND ALIMONY—

The proper procedure where it is sought to have a decree for alimony modified is by filing a petition asking for a modification for reasons which have arisen since the rendition of the original decree. 72.

The change in the circumstances of the petitioner which will warrant a modification of the decree must be of so material a character as to make a modification necessary to suit the altered condition of the parties. 72.

The loss by a wife of the aid of her son by reason of his marriage does not constitute such a change in circumstances as to warrant a modification of the decree, since a presumption arises that the court in granting the decree had in mind that the son would probably marry. 72.

Where a husband and wife grow apart through the superior opportunities of the husband for development, the resulting incompatibility is not a ground for divorce. 245.

An abandoned wife who is in feeble health and whose husband has real estate in the county estimated to be worth \$1,000, is entitled to an allowance of \$500 alimony with a further allowance of \$15 a month for maintenance

and \$100 attorney's fees, and said allowances will be made a charge upon the real estate. 394.

Ineffective transfer of property and execution of mortgages by the grantee, made for the purpose of defeating the claim of the wife for alimony. 394.

Service by publication in suit by an abandoned wife for alimony. 394.

EASEMENT—

Of an abutting owner in the sidewalk in front of his property. 358.

EJECTMENT—

The Ohio forcible detainer statute is broad enough to permit of a suit in ejectment against a vendee who has defaulted in his payments under a contract of purchase which expressly provides that in case of default possession shall be surrendered to the vendor. 493.

ELECTIONS—

Under a will—see WILLS.

Failure to provide election machinery for canvassing and reporting the vote on the Home Rule Amendment to the Constitution does not prevent that amendment from becoming a part of the organic law of the state. 417.

The interpretation given by advocates or opponents of proposed amendments during a political campaign will not be followed by the courts merely because the amendment is afterward adopted by the voters. 417.

ELECTRIC LIGHTING—

While express consent should be secured by an electric light company from the proper municipal authorities before undertaking to lay conduits or string wires in the public ways, yet if council should unreasonably refuse to grant such permission to a company having the permission of abutting owners so to do, mandamus or a mandatory injunction

will lie on petition of the company. 305.

EMINENT DOMAIN—

Appropriation of park property for railway purposes. 587.

Damages to the residue may be recovered either in an action to compel appropriation or in one brought to appropriate. 587.

EMPLOYER'S LIABILITY—

State courts may take jurisdiction under the Federal employers' liability act, but the verdict in such a case must be unanimous. 254.

ERROR—

Where a trial judge becomes satisfied that error was committed in not arresting the case from the jury at the close of plaintiff's evidence, the judgment may be set aside and judgment entered by the court *sua sponte* for the defendant. 225.

Procedure in cases taken up from the municipal court. 298.

EVIDENCE—

As to the contents of a missing spoliated will must be clear and convincing. 121.

FALSE REPRESENTATION—

See MISREPRESENTATIONS.

FINES—

A fine is not collectible from the estate of a decedent. 41.

But the costs of a criminal prosecution against a decedent in his lifetime, where adjudged against him but not collected before his death, are collectible from his estate after his death. 41.

FLOODS—

Liability of railway company for loss of merchandise in transit due to an unprecedented flood. 321.

FORCIBLE ENTRY—

Action in, lies against a vendee who has defaulted in his pay-

ments of installments of purchase money, when. 493.

FRANCHISE TAX—

See TAXATION.

FRANCHISES—

The fact that an ordinance, granting authority to a mutual telephone company to use the streets and alleys in the operation of its lines, was illegally passed does not afford ground for an injunction against operation of the mutual lines on petition of a company operating for profit in the same territory. 177.

FUNERAL EXPENSES—

Medical services distinguished from funeral expenses. 506.

GIFTS—

A voluntary and irrevocable trust held to have been established in a bank deposit where transfer of the title had failed as a gift *inter vivos*. 47.

GOOD WILL—

There is an obligation on the vendor of a business, who has organized a competing business, not to interfere with the old business, notwithstanding the absence of a stipulation not to re-engage in a similar business, and an attempt on his part to solicit customers of the old concern may be enjoined; he may also be enjoined from endeavoring to induce employees of the old concern to leave its employ and enter that of the competing business. 561.

HOME RULE—

Constitutionality of the Home Rule Amendment to the State Constitution; its construction and meaning. 417.

HUSBAND AND WIFE—

Transfer of property by husband and execution of a mortgage upon it by the grantee made subordinate to the claim of the wife for alimony and maintenance. 394.

Unless a wife by a special contract bound her separate estate for medical services rendered in her behalf during her lifetime, the husband is not relieved from liability therefor, and the physician may proceed against the husband on account of such services without first exhausting the wife's separate estate; medical services distinguished from funeral expenses. 506.

There is no right in a wife to recover money damages on account of loss of consortium, due to an accident which rendered her husband irritable, morose and ill-tempered and the responsibility for which she places upon the defendant. 504.

Interference with the domestic relation alone gives the right to recover for loss of consortium. 504.

INJUNCTION—

Against operation of a factory established under protest in a residence neighborhood. 410.

Against putting into effect action taken by interested directors of a corporation. 22.

Lies against occupation by a merchant of a part of the sidewalk in front of his store, when. 358.

Lies against the award of a contract by a municipality, where the specifications upon which bids are invited are so drawn as not to permit of practical and commercial competition. 369.

Does not lie against the hastening of surface water in its course toward and upon the lands of a lower proprietor, when. 379.

Against the operation of a municipal electric light plant at a loss does not lie, when. 593 and 607.

Lies against interference with a former business by a vendor thereof who has organized a competing business, notwithstanding he entered into no stipulation not

to engage in a competing business. 561.

INTOXICATING LIQUORS—

The mayor of a village has jurisdiction in case of an alleged illegal keeping of a place for the sale of intoxicating liquor in a municipality located in the same county. 167.

Constitutionality of the so-called Home Rule Amendment; construction of said amendment. 417.

One who signs a petition for or against the sale of intoxicating liquors in a residence district, is not at liberty to thereafter sign a petition on the opposite side and have his signature counted, unless he first proves in court that fraud or misrepresentation were used in securing his signature to the first petition. 89.

The unlawful sale of intoxicating liquor by a sub-lessee, where the lessee was not aware that such sales were being made or contemplated, does not afford ground for forfeiture of the lease. 97.

JUDGMENTS—

It is too late to demand a judgment on the pleadings after evidence has been heard on the issues raised by the pleadings. 93.

The provision of Section 11601 is for judgment on the pleadings before evidence has been heard, and also after evidence has been heard *non obstante veredicto*. 93.

JURISDICTION—

State courts have jurisdiction to entertain actions brought under the Federal Employers' Liability act, but in such cases the verdict of the jury must be unanimous. 254.

Over an action by a tax-payer to enjoin the city from operating a municipally owned electric light plant at a loss. 593.

JURY—

Application of the new law permitting a verdict upon concurrence of three-fourths of the jury. 173.

LARCENY—

See CRIMINAL LAW.

LEASE—

A new lease made by a lessee for a term extending beyond that of the original lease, which contained an option of purchase on the last day of the term and also a clause of non-assignment without the written consent of the lessor, will not be treated as ground for forfeiture where the lessee intended in good faith to obtain the fee under the privilege of purchase, and a proper tender of the purchase money was in fact made at the stipulated time. 97.

Forfeiture of a lease for a breach of covenant "to permit no unlawful occupation" will not be declared unless the lessee has knowledge of the proscribed use. 97.

LICENSE—

Validity of a vehicle license ordinance. 353.

LIENS—

A vendor's lien can not be based on covenants or agreements. 62.

Lien of a state bank upon the stock of one of its stockholders on a debt due from such stockholder to the bank. 65.

LIMITATIONS—

Of carrier's liability void, when. 194.

MANDAMUS—

Not applicable to a disputed claim by a public officer for salary which has never been allowed. 289.

Will not lie against a public officer to enforce payment of a disputed claim, but the claimant in such a case will be required to pursue his remedy at law. 497.

MASTER AND SERVANT—

See WORKMEN'S COMPENSATION.

An employer not complying with the workmen's compensation act suffers the penalty of being made liable for the negligence of an employee, whether he be a fel-

low-servant or not, and the only question for submission to the jury in such a case is whether the injured employee exercised ordinary care. 33.

Construction of the workmen's compensation law with reference to compensation to employees suffering from diseases induced by reason of the nature of their occupation. 160.

MAYOR—

Jurisdiction of the mayor of a village over violations of the liquor laws occurring within the county. 167.

MISREPRESENTATIONS—

Do not afford ground for recovery back of the amount paid for corporate stock, unless the representations are shown to have been false and to have induced the purchase. 331.

In an exchange of corporate stock for other property, the representation that the "stock was good" or as "good as gold" does not constitute a warranty of the value of the stock, but is a mere expression of opinion. 577.

The failure of the corporation issuing the stock three weeks after the representation was made does not make it false in law, when. 577.

But even if the representations were false they would not constitute a basis for rescission of a completely executed contract. 577.

MONOPOLY—

In the newspaper field—see **CONTRACTS**.

MORTGAGE—

The lien of a mortgage executed by one co-tenant prior to the bringing of a suit in partition and for recovery of rents and profits is superior to the claim of other parceners for rents and profits decreed in the same action. 262.

MUNICIPAL CORPORATIONS—

The vesting of the management of the parks in the director of public safety does not confer power to grant privileges for the

erection of booths for the sale of refreshments. 140.

Parks are included in the "public grounds" of a municipality. 140.

Tenure of an employee who has been appointed temporarily by the mayor. 145.

In appropriating property for park purposes compensation should be limited to present value of the property taken, irrespective of benefits from the proposed improvement. 169.

A municipality may, for the purpose of enlarging its park area, appropriate adjacent property lying within the boundaries of another municipality. 169.

A determination by municipal authorities as to the conditions under which an electric light company may use the streets and public ways must be reasonable and not exercised in an arbitrary manner; exclusive rights and monopoly in the lighting business are not favored; mandamus lies upon petition of a company denied the use of the streets, when. 305.

A vehicle license ordinance is not a general revenue measure, and therefore invalid, because of the fact that the receipts greatly exceed the expenses of collection, if it appears that the surplus is turned into the street repair fund. 353.

In an action involving the validity of an ordinance, the defense of *res adjudicata* is not available where based on the claim that a former ordinance, similar in its provisions, was held constitutional. 353.

Application of the Marmet case to license fees imposed by a municipality. 353.

An ordinance authorizing the use of a part of the sidewalk by an abutting merchant for display of his goods and wares is invalid if such occupancy interferes with the public use of the sidewalk. 358.

The specifications upon which bids are invited must permit of

general competition in the practical and commercial sense. 369.

The purchase of an automobile for municipal use will be enjoined, where the specifications are so drawn as to permit compliance therewith by but one concern, unless compliance is attained at a prohibitive cost. 369.

Jurisdiction over an action to enjoin the operation of an electric light plant by the municipality at a loss; capacity of a tax-payer to maintain such an action; wisdom of such an enterprise not a matter for judicial investigation. 593 and 607.

It is not a misapplication of public funds, or an abuse of corporate power, or a making and carrying out of contracts in contravention of the laws governing Ohio municipalities, for a city to furnish current for light and power at prices which do not make the plant self-sustaining. 593 and 607.

A city is not required by statute to light all or any of its streets or alleys; and if it lights some or all of them at less than cost, it is only carrying out a principle which obtains as to many municipal activities which are provided for the benefit of the public at less than cost or at no cost. 593 and 607.

"Furnishing" electric light and power distinguished from "selling" current for light and power. 593 and 607.

A municipality can not discriminate in the service of whatever kind furnished to its citizens, but a varying rate for electric current may not be discriminatory; but if it were discriminatory it is not a matter about which a tax-payer may complain. 593 and 607.

Proper test as to the validity of a bill-board ordinance, or the extent to which such an ordinance is valid. 1.

Provisions for regulation of bill-boards which are reasonable and others which were found to be unreasonable. 1.

The legality of an action by a municipality depends upon its power so to do and the method employed in execution. 468.

The appropriation made by the council of the city of Cleveland toward the expense of celebrating the centennial anniversary of Perry's Victory on Lake Erie, was an appropriation for a public purpose and was authorized by the charter of that city. 468.

Presumption as to regularity of proceedings by council; contracts: ratification. 468.

NECESSARIES—

The statute relating to indebtedness for necessities does not apply to the claim of a merchandise broker. 443.

Goods may fall within the class of necessities but the claim of the seller not be maintainable thereunder. 443.

NEGLIGENCE—

Assumption of risk and contributory negligence distinguished. 33.

Liability for the negligence of a fellow-servant under the workmen's compensation act. 33.

Where a telephone lineman is injured by the fall of a pole which was rotten at the base and the company has failed to pay into the state insurance fund, evidence will be excluded as to a custom which cast upon the lineman rather than the company the duty of inspecting poles as to their condition. 129.

In such a case the jury will be specifically instructed that the company is charged with knowledge of the defective condition of the pole. 129.

Loss of one out of a shipment of horses held to have been due to the negligence of the shipper rather than the carrier. 194.

On the part of a carrier does not constitute the proximate cause of a loss concurrent with an act of God where the loss was not

one which could have been foreseen. 321.

NEGOTIABLE INSTRUMENTS—

See PROMISSORY NOTES.

NEW TRIAL—

A trial judge may on motion for a new trial set the verdict in favor of the plaintiff aside and give judgment for the defendant *sua sponte*, when. 225.

NOTICE—

There is no requirement that notice be given to the Italian consul of application for letters on the estate of a deceased Italian subject, when the applicant for letters is one of the next of kin and a minor son of the decedent is in court consenting thereto. 9.

To the beneficiary of a deposit made in bank in his favor is not necessary; his acceptance of the trust thereby created will be presumed. 47.

NUISANCE—

Whether a business is a nuisance depends upon the nature of the vicinage and the continuity of the thing complained of. 410.

Injunction against the operation of a saw mill and stair factory, established in a residence neighborhood under protest. 410.

OFFICE AND OFFICER—

See CIVIL SERVICE.

As to the tenure of municipal employees appointed temporarily by the mayor. 145.

A public officer who served under an unconstitutional salary law and accepted the compensation therein provided, can not years afterward plead the invalidity of the act as a basis for recovery of fees which he paid into the county treasury. 289.

A county clerk is not entitled under the present salary law to retain as an emolument of his office one-half of the fees up to \$3,000, received for services in matters pertaining to naturalization, but he must account to the state for fees so received the same

as for fees received for services rendered under the laws of the state. 449.

PARKS—

Appropriation of land for—see MUNICIPAL CORPORATIONS.

Are included in the term "public grounds" as used in the statutes referring to the powers of council. 140.

A strip of ground leased by a municipality to a railway company for a term of years for occupation by its tracks remains a part of the original tract subject to the incumbrance of the lease, and upon appropriation of the strip by the railway company, subject to the expiration of the lease, the city may recover damages to the residue. 587.

Damages to the residue may be recovered either in an action to compel an appropriation under the statute or in one brought to appropriate. 587.

PARTITION—

A mortgage executed by one tenant prior to the bringing of a suit in partition and for rents and profits is superior to the claims of other parceners decreed in the same action. 262.

PATRIOTIC EVENTS—

Power of a municipality to appropriate money to assist in the celebration of—see MUNICIPAL CORPORATIONS.

PHYSICIAN AND SURGEON—

Medical services distinguished from funeral expenses. 506.

PLEADING—

In an action by a tax-payer to enjoin the operation of a municipally owned electric plant at a loss. 593.

In an action for injuries to an employee; reference to the workmen's compensation law subject to a motion to strike out; necessary averments. 614.

In an action under the workmen's compensation act it is proper to allege such facts as indicate

the applicability of the act to the case in hand, and this includes an allegation that he employs five or more workmen and has not contributed to the state insurance fund. 445.

A pleading is not vitiated by the name given to it. 465.

There is no provision under the code of civil procedure for the form of pleading known as "recoupment," but the term counterclaim, which includes recoupment and set-off, is used; but if recoupment is properly pleaded it will not be struck from the answer merely because it is designated as "recoupment" instead of "counterclaim." 465.

In an action on a contract but partly performed; effect of a tender the amount admitted to be due. 590.

POLICE POWER—

The act requiring that certain articles shall be sold by avoirdupois weight or numeral count is an unreasonable exercise of the police power. 401.

PRESUMPTION—

That evidence was heard by the grand jury which returned the indictment in question. 365.

That an action brought against the estate of a decedent was properly defended. 337.

PROMISSORY NOTES—

Claim that notes were given for a consideration which failed is not a defense, when. 273.

PROXIMATE CAUSE—

Determination as to, where goods in transit were destroyed by an unprecedented flood. 321.

PUBLIC CONTRACTS—

See CONTRACTS.

PUBLIC UTILITIES COMMISSION—

A mutual telephone company, not operating for profit, is not subject to. 177.

RAILWAYS—

A switching service, within the meaning of Section 8998, is one which precedes or follows a trans-

portation service, and applies only to a shipment upon which legal freight charges have already been earned or are to be earned. 81.

The fact that a transportation service is between termini which are within the switching limits of a municipality does not render such service a switching service. 81.

Where a transportation service is to be made over the lines of two connecting carriers between termini entirely within the switching limits of the city, the charge may be in excess of the rates set forth in Section 9000, provided the rate charged is fair and reasonable and in proportion to the value of the service rendered. 81.

Limitation of carrier's liability void, when; void clauses do not render entire shipping contract void; failure to file claim for loss for more than eight months bars recovery on such claim under a shipping contract containing a provision against such delay. 194.

A shipper who crowds twenty-one horses into a car and finds upon arrival that one of them has been so injured that it must be killed can not recover in the absence of a showing of negligence on the part of the railway company. 194.

Delay in transit held not the proximate cause of the loss of merchandise during the prevalence of a flood. 321.

RATIFICATION—

As applied to a contract entered into by a municipality. 468.

REAL ESTATE AGENT—

A real estate agent is not entitled to a commission for procuring a purchaser of property unless he procures an enforceable contract of sale. 486.

RECOUPMENT—

Not provided for in the code of civil procedure, but if properly pleaded will not be stricken from the answer. 465.

RENTS AND PROFITS—

A mortgage executed by one tenant is superior to the claims

of the other parceners for rents and profits, when. 252.

REPEALS—

See CONSTITUTIONAL LAW.

RETROACTIVE LAWS—

An ordinance relating to bill-boards is not retroactive where made to apply to the re-erection of a board which had been erected under different provisions but had been torn down. 1.

SALARY ACT—

Construction of, with reference to fees received by county officers in naturalization cases. 449.

SALARY AND WAGES—

It is a violation of the statute relating to the assignment of wages to fail to fill in the blank form provided by statute, in figures, the amount due from the assignor under the assignment. 59.

SAVINGS BANKS—

See BANKS AND BANKING.

SHADE TREES—

May not be trimmed or interfered with by a telephone company without the consent of the owner. 191.

SIDEWALK—

Occupation of part of, by proprietor of store occupying abutting property, for exhibition of his goods and wares; whether unlawfully authorized by ordinance is a question of fact to be determined by judicial inquiry. 358.

SIGNS—

The right of a grantor to maintain signs on the premises conveyed free of rental therefor can not be made the basis of a vendor's lien. 62.

STATUTES CONSIDERED—

Sections 3618 and 3619, relating to municipal electric light plants. 593 and 607.

Sections 5415 *et seq.*, relating to public utilities. 545.

Sections 13044-5, relating to labor on Sunday. 554.

Section 6207, providing that the

unlawful sale of intoxicating liquor shall work a forfeiture of the lease of the premises on which the sales are made. 97.

Section 6418-1, relating to the sale of certain articles by weight or numeral count. 401.

Section 8688, prescribing a limitation for enforcement of stockholder's liability. 481.

Section 9000, providing rates for switching the cars of other companies. 81.

Section 6145, relating to precedence of petitions in local option districts. 89.

Section 6149, providing who may sign local option petitions. 89.

Section 11601, providing when judgment shall be rendered contrary to the verdict. 93.

Section 10214, relating to the construction of remedial statutes. 93.

Section 9683 of the free banking act, providing that the stock of such banks shall be subject to lien of the bank for an indebtedness by the stockholder. 65.

Section 10617, relating to the granting of letters of administration. 9.

Section 6346-4, relating to the assignment of salary or wages. 59.

Section 4488, relating to temporary appointments of municipal employees under the civil service act. 145.

Section 486-15 of the civil service act, relating to promotions and examinations. 145.

Section 11643, relating to the application of the chapter of the General Code relating to relief after judgment. 209.

Section 6415, providing subdivisions for the half-bushel. 257.

Section 12046, relating to actions by one parcener against another. 262.

Section 13622, relating to pleas in abatement in criminal cases. 265.

Section 11455, authorizing a verdict upon concurrence of three-fourths of the jury. 273.

Section 1465-63, providing the amount of money to be contributed by the state itself to the workmen's compensation fund. 279.

Section 3714, relating to control by council over streets and public grounds. 358.

STOCKHOLDERS—

Liability of, and actions to enforce; limitation contained in Section 8688 not applicable, when. 481.

SUMMONS—

A summons in an action for recovery of money only upon which there is no endorsement of the amount sought to be recovered, is effective to bring the party into court; a properly endorsed summons thereafter issued upon application of the plaintiff becomes the original summons in the action and not an alias summons. 223.

SUNDAY LAWS—

The keeping open of a bakery on Sunday is a violation of Section 13044, notwithstanding only fresh stuffs are sold and the community is in the habit of procuring from such bakery on Sunday its supply of fresh bread stuffs for the day. 554.

What constitutes a work of necessity within contemplation of the statute. 554.

SURETIES—

The limitation of time within which suit may be brought on the bond of a defaulting contractor is waived by the surety when it consents that another may step into the place of the contractor and complete the work. 225.

But where a second default occurs as to which there is no waiver, and suit is not brought on the bond within the time stipulated therein, the limitation becomes effective and an action begun thereafter can not be maintained. 225.

A party undertaking to complete the work of a defaulting contractor is not the agent of the surety. 225.

On an administration bond and a bond for the sale of real estate belonging to the same decedent are proportionately bound for unpaid collateral inheritance tax. 497.

SWITCHING CHARGES—

See RAILWAYS.

TAXATION—

Inheritance taxes are taxes on the right and privilege of inheriting or succeeding to property; they are excise taxes and not taxes on the property received. 497.

An inheritance tax paid by an executor is on account of the distributees. 497.

Sureties on an administration bond and a bond for sale of real estate belonging to the same decedent are proportionately liable for unpaid collateral inheritance tax. 497.

A corporation organized under a community arrangement for furnishing factory power, heat and water, is not a public utility and is not subject to the franchise tax, when. 545.

TAX-PAYER—

A court in its discretion may permit a tax-payer to maintain an action to enjoin the taking of steps in contemplation of expenditure of public funds under a recent amendment to the Constitution which it is claimed was illegally adopted. 417.

The legal capacity of a tax-payer to maintain an action to enjoin the municipality from maintaining and operating a municipally owned electric light plant at a loss is sufficiently shown by averments as to the official position of the city solicitor and his refusal to bring the action upon request. 593 and 607.

But the fact that the rates charged by the municipality for electric current are discriminatory is a matter which in nowise affects a plaintiff in his capacity as

a tax-payer and an allegation as to such discrimination can not be considered. 593 and 607.

TELEPHONE COMPANIES—

A mutual telephone company, existing and operated as a utility but not for profit, does not come within the jurisdiction of the state public utilities commission and may operate a plant without first having obtained a certificate of necessity. 177.

The council of a village has power to grant to such a company a permissive license to enter upon the streets and alleys for construction and maintenance of its plant. 177.

The fact that such an ordinance was illegally passed does not afford ground for an injunction against the operation of the mutual lines at the instance of a company operating telephone lines for profit in the same territory. 177.

Where the land of an abutting owner extends to the middle of the highway, a telephone company may be enjoined from maintaining its line of poles in front of said property or from trimming the trees along said line, where the poles were placed there without obtaining the written consent of the owner or making compensation to him and the possession of the company has continued for less than twenty-one years. 191.

TERMS OF COURT—

See COURTS.

TITLE—

Action to quiet title against billboard rights. 62.

TRUST—

A trust may be established by parol in a fund on deposit in a bank. 47.

Failure to establish by clear and unequivocal testimony an effective transfer of the legal title to a fund, operating as an executed gift *inter vivos*, does not preclude the donee from showing and enforcing a perfect valid trust. 47.

Word "for" held to indicate a fiduciary relationship and construed as equivalent to "trustee for." 47.

Notice to H of a deposit in bank in his favor held to be unnecessary and acceptance by him of the trust intended to be created in the deposit will be presumed. 47.

VENDOR AND PURCHASER—

A purchaser of real estate may be ejected, where the contract provides for surrender of possession in case of default in payment of installments of purchase money as they become due. 493.

The vendor of a business who has organized a competing business may be enjoined from soliciting customers of the old concern, or from inducing its employees to leave and take employment with the new concern, notwithstanding he did not enter into a stipulation not to re-engage in a similar business. 561.

VENDOR'S LIEN—

A vendor's lien can not be based on covenant and agreements. 62.

A vendor's lien on real estate is limited to unpaid purchase money, and can not be based on the reservation of a privilege or license, such as the right of the grantor to erect and maintain on the premises conveyed bill-boards and signs free of rental therefor. 62.

VENUE—

Change of, in a criminal case; the best test as to whether a fair trial can be had in the home county is afforded during the impaneling of a jury to try the case. 535.

VERDICT—

Of jury must be unanimous in an action in a state court under the Federal employer's liability act. 254.

The provision of amended Section 11455, authorizing a verdict upon concurrence of three-fourths

of the jury, does not apply to a cause of action stated in an action commenced after May 4, 1913, where the cause of action accrued long prior to that date. 273.

The recent holding of the Supreme Court, with reference to verdicts upon concurrence of three-fourths of the jury, distinguished. 273.

WAGES—

As to conformity with the statute governing the assignment of wages—see SALARY AND WAGES.

WAIVER—

The limitation of time within which suit may be brought on the bond of a defaulting contractor is waived by the surety when he consents that another may step in and complete the work. 225.

WATER AND WATER-COURSES—

Injunction does not lie against the hastening by an upper proprietor of water collecting on his lands but naturally draining toward and upon the lands of a lower proprietor, when. 379.

Application of the doctrine of waiver and acquiescence to a public officer who accepted compensation under an unconstitutional law. 289.

WARRANTY—

See MISREPRESENTATIONS.

The act providing that certain articles shall be sold by weight or numeral count is an unreasonable exercise of the police power and therefore unconstitutional. 401.

WEIGHTS AND MEASURES—

The power vested in Congress to regulate weights and measures does not extinguish the authority of the states over the same subject until Congress sees fit to exercise the power so conferred. In the meantime each state is at liberty to establish its own standards, and Section 6415 as amended is a valid enactment. 257.

WILLS—

A spoliated will can not be admitted to probate, notwithstanding declarations which sufficiently establish its existence at the time of the death of the testator, if it is impossible to determine its contents by clear and convincing evidence as to its provisions. 121.

WORDS AND PHRASES—

The words "public grounds" as used in the statutes referring to the powers of council include parks. 140.

The words "furnishing" and "selling" distinguished. 607.

WORKMEN'S COMPENSATION—

See EMPLOYERS' LIABILITY INSURANCE.

Validity of the constitutional provision relating thereto. 279.

Validity of Section 1465-63, fixing the amount of money to be contributed to the insurance fund by the state itself. 279.

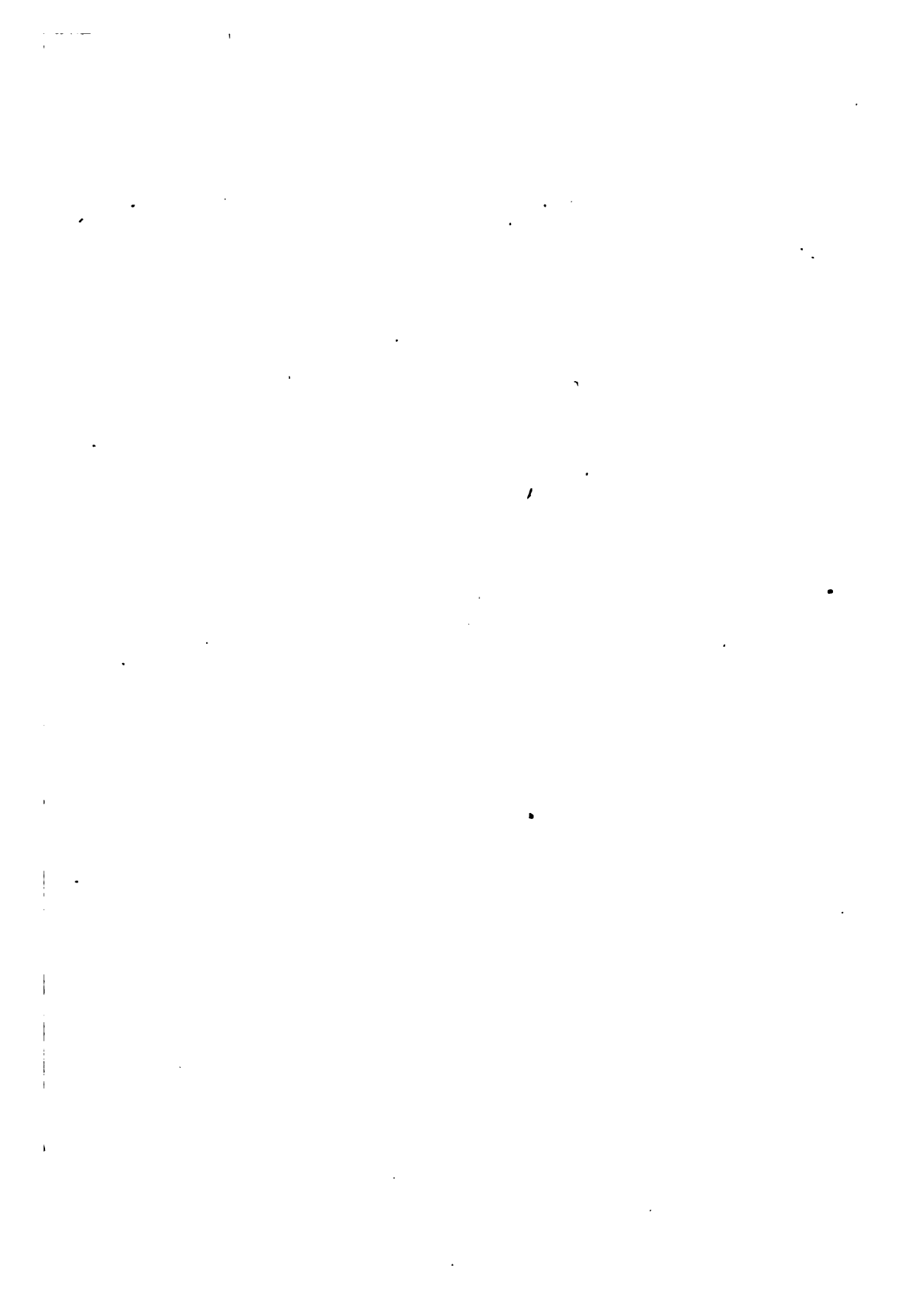
Knowledge of the defective condition of telephone poles will be imputed to the company in an action for injuries to a lineman, where the company has failed to pay into the state insurance fund. 129.

The relief contemplated by the workmen's compensation law includes lead poisoning, where suffered by an employee in the course of his employment. 160.

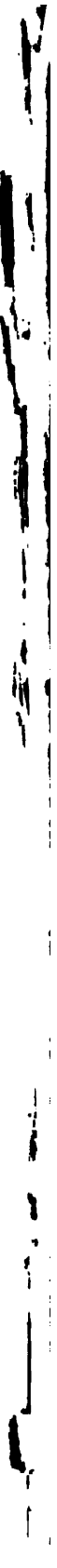
Facts which show the applicability of the act to the case in hand may be properly alleged in the petition. 445.

An employer not complying with the provisions of, suffers the penalty of being made liable for the negligence of an employee, whether he be a fellow-servant or not, and in an action by an employee for injuries suffered through the negligence of a fellow-employee the only question for submission to the jury is whether the injured employee exercised ordinary care. 33.

7-2 E,
5/9/15



3373 005



HARVARD LAW LIBRARY

